No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CAPITAL IMAGING ASSOCIATES, P.C.,

Petitioner,

vs.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., MOHAWK VALLEY PHYSICIANS HEALTH PLAN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILLIP G. STECK
Counsel of Record
MARK E. WATKINS
COOPER, ERVING, SAVAGE, NOLAN & HELLER
Counsel for the Petitioners
39 North Pearl Street
Albany, New York 12207
(518) 449-3100

QUESTIONS PRESENTED

1. When an organization of competitors has engaged in a horizontal combination "to insulate [its] members from increased competition,"[1] and has successfully excluded a rival from a sector of the market, does Rule of Reason analysis under § 1 of the Sherman Act require defendants to offer a procompetitive justification for the exclusion?

2. In the absence of a procompetitive justification for a horizontal exclusion, does Rule of Reason analysis under § 1 of the Sherman Act permit summary judgment dismissing the complaint upon a finding that defendants lacked market power?

3. Does an organization of competitors, which forms part a legitimate joint venture, nonetheless effect a naked restraint of trade when its action has an overt anticompetitive purpose, harms consumers by depriving them of choice among providers of differing quality, and is not reasonably ancillary to the procompetitive purposes of the joint venture?

---

[1] *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 545 (2nd Cir. 1993).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
DECISIONS OF THE COURTS BELOW	1
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
Horizontal Nature of the Combination	2
Combination to Achieve an Unlawful Objective	3
The Market for Radiology Services	4
Exclusion from a Sector of the Market	5
Opinion of the District Court	6
Opinion of the Second Circuit	6
ARGUMENT	9
I. THERE IS WIDESPREAD CONFUSION IN THE LOWER COURTS CONCERNING THE PROPER ANALYSIS OF A HORIZONTAL RESTRAINT WHICH LACKS ANY PROCOMPETITIVE JUSTIFICATION	9
A. The Second Circuit's interpretation of *Dentists* cannot be reconciled with the approaches of other Circuits and the Federal Trade Commission	10

Page

B. The Second Circuit's approach cannot be reconciled with this Court's Rule of Reason jurisprudence 11

C. MVMA's conduct is a naked restraint of trade 14

II. THE SECOND CIRCUIT'S REQUIREMENT THAT A PLAINTIFF ESTABLISH MARKET POWER IN A CASE CHALLENGING A HORIZONTAL RESTRAINT OF TRADE IS A DEPARTURE FROM THE RULE IN THIS COURT AND IN THE MAJORITY OF CIRCUITS 16

A. The Courts of Appeals do not rely on Market Power in their analysis of Horizontal Restraints 17

B. Reliance on market power is inappropriate in analysis of joint ventures 18

C. Reliance on market power in horizontal cases is contrary to important antitrust policies 20

III. THE COURT OF APPEALS FAILED TO CONSIDER THE IMPACT OF THE EXCLUSION UPON CONSUMERS 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Opinions Below

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 725 F.Supp. 669 (N.D.N.Y. 1989) 1, 5, 7

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 791 F.Supp. 956 (N.D.N.Y. 1992) 1

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537 (2nd Cir. 1993) ..... *passim*

Federal Cases

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899) . 18, 19

Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) 24

Association of Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519 (1983) 15

Barry v. Blue Cross of Cal., 805 F.2d 866 (9th Cir. 1986) 15

Bhan v. NME Hosp., Inc., 929 F.2d 1404 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 617 (1991) . 25

Blue Cross of Wash. and Alaska v. Kitsap Physicians Serv., 1982-1 Trade Cases ¶¶ 64,588, 64,589, p. 73,206 (W.D.Wash. 1981) 16

Page

Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990) . . 17

Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) 13

In re Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S.Ct. 461 (1992) . . 11, 14, 17

E.W. French & Sons, Inc. v. General Portland, Inc., 885 F.2d 1392 (9th Cir. 1989) 11, 17, 24

Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S.Ct. 2072 (1992) 23

Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) . . . . . *passim*

Hahn v. Oregon Physicians' Serv., 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S.846 (1989) 13, 17, 26

Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984) 26

Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C.Cir. 1984) 17

Lie v. St. Joseph Hosp. of Mount Clemens, Mich., 964 F.2d 567 (6th Cir. 1992) 10

Miller v. Indiana Hosp., 843 F.2d 139 (3rd Cir.), *cert. denied*, 488 U.S. 870 (1988) 17

National Bancard Corp. v. VISA, U.S.A., Inc., 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) 17, 19, 20

National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) . . . . . *passim*

Page

National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978) 13, 15

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985) 12, 13

Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 973 (1992) 18

Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988) 17

Palmer v. BRG of Ga., Inc., 874 F.2d 1417 (11th Cir. 1989), *rev'd*, 498 U.S. 46 (1990) 11, 12

R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139 (9th Cir. 1989) 11, 20

Reazin v. Blue Cross and Blue Shield of Kan., 899 F.2d 951 (10th Cir.), *cert. denied*, 110 S.Ct. 3241 (1990) 11, 17

Rothery Storage & Van Co., v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 12, 19, 20

Standard Oil Co. v. United States, 21 U.S. 1 (1911) 16

United States v. Topco Assocs., 405 U.S. 596 (1972) 12, 14, 21

Federal Statutes and Regulations

F.R.Civ.P. 56(c) 2

F.R.Civ.P. 56(f) 6

	Page
Sherman Act, 15 U.S.C. §§ 1 and 22	*passim*
FTC, *Statement of Enforcement Policy, Physician Agreements to Control Medical Prepayment Plans*, 46 Fed.Reg. 48982-06 (1981)	22
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	6
Miscellaneous	
2 E. Kintner, *Federal Antitrust Law* (1980)	21
7 P. Areeda, *Antitrust Law* (1986)	22, 24
P. Areeda, *Market Definition and Horizontal Restraints*, 52 Antitrust L.J. 553 (1983)	22
FTC, *Staff Advisory Opinion*, March 26, 1984	20, 22
T. Greaney and J. Sindelar, *Physician-Sponsored Joint Ventures: An Antitrust Analysis of Preferred Provider Organizations*, 18 Rutgers L. J. 513 (1987)	23
T. Jorde & D. Teece, *Rule of Reason Analysis of Horizontal Agreements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 Antitrust L.J. 579 (1993)	16, 23
T. Kauper, *The Role of Quality of Health Care Considerations in Antitrust Analysis* 51 Law and Contemporary Problems 273 (1988)	15, 16, 23, 25
T. Krattenmaker, R. Lande, and S. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Georgetown L. Rev. 241, 255 (1987)	22

Page

T. Piraino, *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1 (1991) 19, 24, 25

L. Sand, et al., *Modern Federal Jury Instructions*, Revision 15, February 1992, V.3 ¶ 79.04, (Comment to Instruction 79-44) 18

J. Shenefield, *A Response to Professor Areeda*, 52 Antitrust L.J. 587 (1983) 23

L. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 Calif. L. Rev. 835 (1987) 21

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CAPITAL IMAGING ASSOCIATES, P.C.,

Petitioner,

vs.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., MOHAWK VALLEY PHYSICIANS HEALTH PLAN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Capital Imaging Associates, P.C., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 10, 1993.

DECISIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 996 F.2d 537, 1993-1 Trade Cases (CCH) ¶ 70,270.

The opinions of the United States District Court for the Northern District of New York are reported at 791 F.Supp. 956, 1992-1 Trade Cases (CCH) ¶ 69,820 and 725 F.Supp. 669, 1990-1 Trade Cases (CCH) ¶ 68,940.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal.

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

Horizontal Nature of the Combination

In 1988, petitioner Capital Imaging Associates, P.C., ["Capital"], a group of radiologists in private medical practice, brought this antitrust action challenging its exclusion from membership in Mohawk Valley Medical Associates ["MVMA"]. The Court of Appeals concluded that "Mohawk Valley excluded [Capital] from the practice association in order to insulate Mohawk Valley's member radiologists from increased competition." 996 F.2d at 545.

MVMA accomplished the exclusion because it operates in a joint venture with a health insurer, the Mohawk Valley Physicians Health Plan ["MVP"]. MVP delegated to MVMA the exclusive right to determine which physicians may provide services

to MVP-insured patients in a five county area of New York State.[2] MVMA included 64% of all physicians in Schenectady County (including 75-80% of primary care physicians in that county) [A594], 82% of all physicians in Saratoga County, 69% in Montgomery County, 46% in Fulton County, and 35% in Rensselaer County. [A460][3]

MVMA is an "association of competing doctors, including radiologists, all of whom are in private practice for themselves and who...are independent practitioners with separate economic interests." 996 F.2d at 544. The Court of Appeals agreed that MVMA's exclusion of Capital from membership in an organization of competitors was horizontal. *Id.* at 539.

Combination to Achieve an Unlawful Objective

The Court of Appeals held that respondents' conduct revealed "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 545. The Court summarized the evidence of an illegal agreement as follows:

> Mohawk Valley excluded [Capital] from the practice association in order to insulate Mohawk Valley's member radiologists from increased competition. For example, Capital has shown that Mohawk Valley recruited primary care doctors - who, like Capital, were located in Latham - because they could attract new patients and bring increased referrals to Mohawk Valley medical specialists. By contrast, **Mohawk Valley excluded Capital's referral practice because accepting it would only increase internal competition among its members for radiology referrals**....
>
> [Capital's] application for admission was denied despite its offer to open an office within the Plan's service area and despite the New York State Department of Health's [DOH] lack of objection to the inclusion of

---

[2] This arrangement in which a health maintenance organization contracts with an independent physicians association is known as an IPA-model HMO.

[3] References are to the Appendix filed in the proceedings before the United States Court of Appeals for the Second Circuit.

> a medical purveyor located outside the HMO's service area. Again, Capital noted its application was denied by Mohawk Valley without adherence to its membership practices, which require pre-rejection notification and an opportunity for a hearing. Ignoring its own written standards in the case of Capital's application for membership strongly suggests **the objection to that application may have been a sham.**

Id. [Emphasis added.]

MVMA's executives repeatedly professed only one reason for excluding Capital: the location of the radiology group's offices in Latham, in Albany County, barely a mile outside the borders of Schenectady, Saratoga, and Rensselaer counties. [A356, 484-93, 555-56, 617] Capital's excellent medical qualifications were never considered. [449-50, 482-93, 540, 578, 607, 701][4]

The Market for Radiology Services

Capital does not control the decision as to which patients will be examined at its facility. Radiologists see patients only upon referral. Referring physicians use the resulting report in making decisions about diagnosis and treatment. The patient makes no direct use of the report, and must rely on the physician to evaluate the quality of the radiological services provided. [A166, 448-49, 459-60].

Radiologists compete for patient referrals based upon differences in the quality of services offered to referring physicians. Referring physicians prefer radiologists who are able to provide a complete array of diagnostic modalities, to maintain state-of-the-art imaging equipment capable of producing interior body images of high quality, to interpret the images accurately, and to report the results promptly. [A448-49, 459-60]

---

[4] Capital has never sought to undermine the pro-competitive aspects of respondents' health plan. The Court of Appeals agreed. "Our view does not interfere with either an HMO's ability to enter into vertical agreements with doctors' associations or with physicians' abilities to regulate membership in practice associations for medically supportable reasons." *Id.* [Emphasis added]

Exclusion from a Sector of the Market

MVP is a provider-controlled health plan. In 1987, 50% of the MVP Board of Directors were physicians, all but one of which were from Schenectady. [A221] The Mohawk Valley Physicians' health plan was formed under the auspices of the Schenectady County Medical Society. [A552] The President of Schenectady Radiologists, a major competitor of Capital, was a founder of the health plan and has served on the Boards of Directors of both MVP and MVMA since their inception. [A221, 343, 539, 551-52, 554-56]

The Schenectady-based health plan has extended its hegemony over the five county area into Albany County. In the course of providing comprehensive health care services in the bordering counties of Schenectady, Saratoga, and Rensselaer, the health plan has attracted patients who live or work in Albany, has contracted to insure employees of organizations located in Albany, has marketed its services to various Albany communities, and has as its members a significant number of physicians with offices in Albany County. [A171, 217, 463-64, 497-503, 511-514, 544-45, 632-42]

MVMA physicians must refer their MVP-insured patients only to MVMA specialists. [A540, 601, 702; 725 F.Supp. at 674] However, MVMA physicians do not segregate their patients for referral purposes on the basis of who is paying for the services. [A168-69] Thus, one of Capital's major competitors realized a fivefold increase in its referrals of both MVP and non-MVP patients after joining MVMA. [A447, 454-55]

Respondents' exclusionary behavior gives MVMA physicians competitive advantages which Capital is powerless to overcome. Capital cannot gain access to patients in the five county area by lowering its prices or improving the quality of its services. Patients consider the prices offered by MVP and its competitors in the health insurance market, [A281] not prices in the market for medical services. Furthermore, as the Court of Appeals recognized, 996 F.2d at 545, patients are attracted to MVP by its *primary care physicians*, [A450-51, 584, 592-93, 599, 601-02], not specialists.

Since member physicians are paid on a fixed fee-for-service basis, [A26] competition for referrals within the health plan is based solely on quality of care, convenience, and other non-price factors. In its marketing literature, MVP stresses consumers' ability to choose from a long list of physicians as the major characteristic which distinguishes the IPA-model HMO from preferred provider organizations sponsored by conventional health insurers and staff model HMOs. [509][5]

Opinion of the District Court

Petitioner filed the complaint [A9-16] in the United States District Court for the Northern District of New York. Federal question jurisdiction was invoked pursuant to 28 U.S.C. § 1331. The action alleged violations of §§ 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1 and 2.

Defendants' initial motion for summary judgment resulted in dismissal of the § 2 claim. This ruling was not appealed. After completion of limited discovery concerning the § 1 claim pursuant to F.R.Civ.P. 56(f), a second motion for summary judgment was granted. The Court held that the case involved a vertical non-price restraint, that, as a result, no combination in restraint of trade existed, and that Capital failed to prove as a prerequisite to liability that defendants had power in the health insurance market.

Opinion of the Second Circuit

The Court of Appeals agreed with petitioner that the foundation of the District Court's analysis was fundamentally flawed, that the restraint was horizontal in nature, and that MVP and MVMA had engaged in an anti-competitive conspiracy. The Court of Appeals also seemed to reject the notion that market power must be proven as a threshold matter prior to conducting a Rule of Reason inquiry.

---

[5] Capital's ability to compete for patients is further limited. In theory, a consumer could join a conventional insurance plan which allows the patient to select any licensed radiologist. However, when patients select a health plan, they are unlikely to know their future radiology needs or to whom they will be referred for radiology services. And, they may not be allowed to switch health plans except during a limited time period. [A501]

> The Supreme Court has never explicitly endorsed such an approach . . . Nor have we embraced the view that market power is the *sine qua non* of antitrust liability.

996 F.2d at 546. Although Capital appeared correct on both the facts and the state of existing law, the District Court decision was affirmed. The Court of Appeals held that a combination which lacks market power is incapable of realizing an anticompetitive objective. *Id.* at 547. The Court further ruled that Capital offered no proof of actual adverse effect on price or output, which could serve as an alternative to proof of market power. *Id.* at 546.

The Court of Appeals' opinion did not address Capital's principal challenge to its exclusion from MVMA. Capital has consistently maintained throughout this litigation that the exclusion was a naked restraint of trade which deprived consumers of the right to choose among competing radiologists of differing quality; that such a naked restraint may be condemned under the Sherman Act without extensive inquiry into matters of market definition; and that a procompetitive justification for the naked restraint must be supplied.[6]

This case never reached the stage of expert proof as to market definition. The District Court granted limited discovery to determine "the extent to which associates' [MVMA's] network of physicians has penetrated the market." 725 F.Supp. at 680. In response to the second motion for summary judgment, Capital supplied the District Court with the remarkably high percentages of physicians who joined MVMA in each of the 5 counties where MVMA operates.

Neither Capital nor respondents presented evidence to the District Court as to MVP's share of the private health care financing market in the 14 counties in which MVP operates or in the

---

[6] The Court of Appeals inaccurately stated that "Capital believes its exclusion from Mohawk Valley has had actual detrimental effects: an increase in prices for and a deterioration of the quality of radiological services to Plan enrollees." *Id.* at 546. Capital has never offered any evidence of increased prices. Nor has it suggested that effects on quality of professional services are capable of precise measurement. Capital's position is that the Sherman Act protects consumers' right to choose from among providers of differing quality.

5 county area immediately surrounding Albany in which MVMA operates.[7] Respondents offered that MVP's share of the HMO insured population is 32% within its entire 14 county service area [Summary Judgment Mem., October 31, 1991, p. 33, fn. 35]. Capital submitted evidence that MVP's share of the HMO enrolled population among HMOs competing in the segment of MVP's service area from Utica to Albany to Kingston is 27%. [A167]

The second summary judgment motion claimed that respondents lacked market power, but offered no supporting evidence. Only after Capital had demonstrated the strength of MVMA's physician network did respondents submit a reply affidavit focussing on market share.[8]

Respondents' statistics provide a simplistic, deceptive assessment of their market share. This is not a case in which competitors are free to market their product within the entire geographic market. Here, both MVP and MVMA are necessarily limited to discrete regions within the market. By including in their calculations all counties and parts of the several states within a 100 mile radius of Albany,[9] respondents generated statistics stating an artificially low market share. According to respondents, MVP's enrollees constitute 1.15% of the total patient population and 2.39% of the HMO enrolled population; the various IPAs affiliated with MVP have only 6.75% of the region's physicians. [A711-17][10] These statistics were the basis for

---

[7] DOH has certified MVP to operate in 14 counties. MVMA contracts to provide medical services in only five of those counties. MVP contracts with other physicians' groups in the remaining counties of its "service area." The Court of Appeals failed to grasp the limited geographical scope of MVMA's activities. The Court mistakenly reported that MVMA serves all 100,500 MVP enrollees statewide. *Id.* at 539, 547. [A715]

[8] The local rules of the Northern District of New York do not permit reply affidavits. Capital received *ex parte* permission from the Judge's clerk to file the reply. The same clerk limited Capital's response to legal argument and prohibited additional proof.

[9] The 100 mile radius includes portions of New Hampshire, Vermont, Massachusetts, Pennsylvania, and Connecticut.

[10] The Court of Appeals' reference to "1.15 percent of the total *insured* patient population" is again incorrect. 996 F.2d at 537. A review of the record shows that respondents' statistics are for the entire population within the 100 mile radius. No attempt was made to factor out Medicaid, Medicare, veterans benefits, the uninsured, or other non-private health insurance. [A715]

the District Court's decision to grant summary judgment, were uncritically imported into the Court of Appeals' opinion, and ultimately were the sole thread supporting affirmance of the District Court's decision.

ARGUMENT

This case raises a fundamental antitrust issue: whether a conspiracy of competitors, who have successfully excluded unwanted competition from a sector of the market, must provide a procompetitive justification for their concerted action. The Second Circuit held that a procompetitive justification is not required if plaintiff fails to establish at the summary judgment stage that defendants either possess power to control price or output or have caused actual detrimental effects. This approach ignores the cartel's limitation of consumer choice and injury to the competitive process, and cannot be reconciled with the decisions of other circuits, the Federal Trade Commission, or this Court. Because giving cartels of limited scope *carte blanche* has broad implications for antitrust policy, this Court should grant certiorari.

I. THERE IS WIDESPREAD CONFUSION IN THE LOWER COURTS CONCERNING THE PROPER ANALYSIS OF A HORIZONTAL RESTRAINT WHICH LACKS ANY PROCOMPETITIVE JUSTIFICATION.

The lower courts have inconsistently applied the antitrust "Rule of Reason" in cases involving a horizontal restraint, notwithstanding this Court's decisions in *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) and *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). Confusion exists concerning whether these decisions require defendants to provide a procompetitive justification for a horizontal exclusion.

In *N.C.A.A.*, this Court held that the N.C.A.A.'s restrictions on the number, type, and timing of members' television broadcasts were not necessary to the promotion of intercollegiate athletics and precluded association members from competing against one another. In *Dentists*, this Court again found no procompetitive justification for a dentists' association's refusal to supply X-rays to insurance companies.

The contention that a plaintiff, in order to defeat summary judgment, must undertake an empirical analysis of market impact even in the absence of a procompetitive justification "runs counter to the Court's holding in *[N.C.A.A.]* that '[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output' and that such a restriction 'requires some competitive justification even in the absence of a detailed market analysis.' " *Dentists*, 476 U.S. 460 [quoting *N.C.A.A.*, 468 U.S. at 109-110]. Any horizontal restraint which is inherently destructive of the competitive process may be condemned under the Rule of Reason.

> Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference . . . We have never required proof of market power in such a case.

N.C.A.A., 468 U.S. at 108, 111.

Both *N.C.A.A.* and *Dentists* involved horizontal restraints of trade in which members of an organization of competitors attempted to insulate themselves from competition. The Second Circuit agreed that Capital had demonstrated the same type of anticompetitive conduct. 996 F.2d at 545.[11]

A. The Second Circuit's interpretation of *Dentists* cannot be reconciled with the approaches of other Circuits and the Federal Trade Commission.

The Second Circuit held that a plaintiff may invoke the rule of *Dentists* only in the very limited instance when the plaintiff has demonstrated market power or an actual adverse effect on price or output. 996 F.2d at 546. Other Courts of Appeals and the FTC take the position that the rule of *Dentists* also comes into play when defendants' conduct constitutes a "naked" restraint of trade. *E.g.*, *Lie v. St. Joseph Hosp. of Mount Clemens*,

---

[11] *N.C.A.A.* does not support respondents' contention that the "naked" rule is limited only to restraints on price and output. Any naked restraint on competition is invalid. In *N.C.A.A.*, the antitrust violation consisted of depriving members of the right to compete, which necessarily results in adverse effects on price and output by interfering with efficient operation of the market.

Mich., 964 F.2d 567, 570 (6th Cir. 1992); *Reazin v. Blue Cross and Blue Shield of Kan.*, 899 F.2d 951 (10th Cir.), *cert. denied*, 110 S.Ct. 3241 (1990); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 164 (9th Cir. 1989) (*en banc*) (split 6-5 decision) (Norris, J. dissenting) ("the nakedness of a restriction and proof of actual detrimental effects are alternative grounds for obviating proof of market power"); *E.W. French & Sons, Inc. v. General Portland, Inc.*, 885 F.2d 1392, 1405 (9th Cir. 1989) (Farris, J., concurring) (court must "predict what the consequences of a given practice will be by examining the context in which the practice occurred").

In a recent Sixth Circuit decision, the Court decided whether the Federal Trade Commission "as was the case in [*Dentists*] . . . has demonstrated 'actual detrimental effects' or 'the potential for genuine adverse effects on competition.' " *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S.Ct. 461 (1992). The Court upheld the FTC's tripartite analysis, which begins by asking whether a restraint is "inherently suspect." *Id.* at 470. The FTC found the Detroit Auto Dealers' restriction of their hours of operation inherently suspect, even though the FTC did not demonstrate any adverse effect on price, and had not considered whether customers could obtain the same services from nearby or suburban car dealers. *Id.* Since there was no persuasive procompetitive justification for the dealers' conduct, the FTC invalidated the practice.

B. The Second Circuit's approach cannot be reconciled with this Court's Rule of Reason jurisprudence.

Judge Clark's dissent in *Palmer v. BRG of Ga., Inc.*, 874 F.2d 1417 (11th Cir. 1989), *rev'd*, 498 U.S. 46 (1990) (*per curiam*), sets forth a sound explication of proper Rule of Reason analysis of a horizontal restraint. The Eleventh Circuit held that an agreement between two bar review companies, in which one of them would withdraw from competing in Georgia, did not violate § 1 of the Sherman Act. The Court of Appeals accepted defendants' argument that the plaintiffs had not adequately defined a relevant geographic market and hence could not prevail under the Rule of Reason. Judge Clark replied that the challenged agreement was a naked restraint on output.

> The plaintiffs therefore did not have to provide evidence of a relevant market or market power to prevail on their claim. Instead, the burden shifted to *defendants* to provide evidence of some procompetitive efficiency-enhancing virtue to their agreement, which they failed to do.

874 F.2d at 1437. [Emphasis in original]

Palmer is particularly significant because this Court reaffirmed its decision in *United States v. Topco Assocs.*, 405 U.S. 596 (1972), which some courts erroneously thought had been overruled. *E.g.*, *Rothery Storage & Van Co., v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

In *Topco*, this Court emphasized that horizontal restraints are inherently anticompetitive:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete - to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. **Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.**

405 U.S. at 610. [Emphasis added]. This Court has never sanctioned the view that it is acceptable for some competitors to restrict competition in one sector of a market so long as another place within the same geographic market is open to competition. The protection of full and robust competition, which ultimately benefits the consumer, requires that each competitor have unfettered access to the entire market.

The *per se* rule of *Topco* is not applicable to all exclusions from joint ventures. *N.C.A.A.*, 468 U.S. at 101; *Northwest*

Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985).[12] Nevertheless, Rule of Reason analysis of exclusionary behavior requires shifting the burden to defendants to demonstrate "procompetitive efficiencies." 468 U.S. at 114. As a result, this Court "has not evidenced [any] reluctance to apply a rule of reason analysis to strike down rules of professional associations." *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) (citing *Dentists*).

This approach is faithful to the historical formulation of the Rule of Reason, as expressed Justice Brandeis' famous opinion in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, all are relevant facts.

In short, Rule of Reason analysis means weighing the procompetitive and anticompetitive effects of the challenged restraint. When application of the *Board of Trade* criteria fails to demonstrate the existence of any procompetitive effects, "no elaborate industry analysis is required to demonstrate the anticompetitive character" of the restraint. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

Here, after reviewing "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," the Second Circuit concluded that respondents intentionally

---

[12] In *Stationers*, this Court would have applied the *per se* rule had market power been present, but instead remanded the case for Rule of Reason analysis.

restrained competition, and found evidence that MVMA's claim to have excluded Capital because of its location barely one mile outside the five county area "may have been a sham." 996 F.2d at 545. However, the Court held that respondents' successful exclusion of a competitor was acceptable, even though a procompetitive justification for the exclusion has never been articulated at any stage of this litigation. By turning to the question of market power and ending its inquiry there, the Court prematurely cut off Rule of Reason analysis under the *Board of Trade* criteria. The Court of Appeals failed to consider three factors which demonstrate that MVMA's conduct is a naked restraint of trade.

C. MVMA's conduct is a naked restraint of trade.

First, respondents offered to the Court of Appeals a justification which conceded that they have engaged in a naked territorial restraint of trade and a direct attack on competition: "Defendants had a sufficient number of radiologists and the territorial restriction was an efficient way to avoid being forced to address other applications from outside the service area on a time-consuming, individual basis." [Brief of defendants-appellees at 19] The belated, *post hoc* claim that the Health Plan already had a sufficient number of radiologists is nothing but an admission that respondents *already had enough competition* among radiologists in their territory. Such a position is blatantly anti-competitive, classic cartel behavior, and contrary to the purpose of the Sherman Act to foster full and robust competition. *See Topco*, 405 U.S. at 610. Respondents thus seek to convert a legitimate organization designed by statute to promote competition in the health care industry into an exclusionary physicians' club.

Second, the exclusion of Capital is a restriction on output equivalent to the restraint invalidated in *Detroit Auto*. By excluding Albany County specialists, MVMA artificially limits the geographical locations where its enrollees may obtain medical services. There is undisputed evidence in the record that patients from northern Albany County, southern Saratoga County, and Rensselaer County may find it more convenient to use radiologists located in Latham than in Schenectady. [A450, 592, 598]

Third, and most important, MVMA's exclusionary practices restrict output by limiting consumers' choice among providers

of differing quality. "Agreements among firms to eliminate quality rivalry through product standardization or in some other fashion may have adverse consumer welfare effects; they may represent a restriction of output." T. Kauper, *The Role of Quality of Health Care Considerations in Antitrust Analysis*, 51 Law and Contemporary Problems 273, 303-304 (1988). Because the price charged by physicians is fixed by agreement, and because all MVMA physicians are bound by the organization's utilization controls, quality of services is the *sole* basis upon which MVMA physicians compete for patients among MVP enrollees. The usually prominent role of quality in antitrust analysis is magnified. "Quality competition may take the place of competition in terms of price, and product quality may be improved as a result." Kauper, *supra*, at 295.

Consumers' choices of radiology services are made by the referring physicians, not the patients themselves. MVMA physicians cannot refer to non-MVMA specialists, a fact overlooked in the Second Circuit's opinion.[13] The exclusion of radiologists from membership in MVMA for non-medical, anticompetitive reasons thus deprives consumers of meaningful choices as to the quality of the radiology service provided.

The situation is analogous to *Dentists* where a professional organization deprived insurers, on behalf of patients, of the opportunity to evaluate differences in dental care. "Absent some countervailing procompetitive virtue - such as, for example, the creation of efficiencies in the operation of the market or the provision of goods and services [citations omitted] - such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' [citing *Professional Engrs.*, 435 U.S. at 692], cannot be sustained under the rule of reason." 476 U.S. at 459. *Accord*, *Association of Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of

---

[13] *Cf. Barry v. Blue Cross of Cal.*, 805 F.2d 866 (9th Cir. 1986) (non-physician-controlled health plan did not commit antitrust violation because patients were free to utilize the services of doctors who were not members of the plan).

competitive conditions and may be condemned without proof of its actual market effect."). "One of the primary objectives of both state and federal antitrust policy is to insure that the freedom of choice of consumers of goods and services in not restricted by conduct that is anticompetitive." *Blue Cross of Wash. and Alaska v. Kitsap Physicians Serv.*, 1982-1 Trade Cases (CCH) ¶¶ 64,588, 64,589, p. 73,206 (W.D.Wash. 1981) (preliminary injunction granted against IPA which excluded physicians participating in Blue Cross "closed panel" plan).

> As far back as *Standard Oil Co. v. United States*, [221 U.S. 1 (1911)], the Supreme Court observed that 'deterioration of quality . . . was the inevitable result of the monopolistic control over its production and sale.' . . . Quality then is not an absolute. It is the result of a competitive process in which consumers have choices, and which provides incentives to producers to improve goods and services in ways that make them more saleable. . . . This has been a central point of antitrust analysis for decades.

Kauper, *supra*, at 282, 293.

II. THE SECOND CIRCUIT'S REQUIREMENT THAT A PLAINTIFF ESTABLISH MARKET POWER IN A CASE CHALLENGING A HORIZONTAL RESTRAINT OF TRADE IS A DEPARTURE FROM THE RULE IN THIS COURT AND IN THE MAJORITY OF CIRCUITS.

In *N.C.A.A.*, this Court rejected the N.C.A.A.'s claim that the plaintiff's case was defective for failure to prove that television rights to intercollegiate football games was a relevant product market. In *Dentists*, this Court again held that the failure of the FTC to define a geographic market was irrelevant to the unreasonableness of the dentists' agreement.

Nevertheless, the Second Circuit accepted the District Court's finding that defendants lacked market power as a basis for dismissing the complaint. Featured in the Court of Appeals' decision is an article which advocated a change in existing law. T. Jorde & D. Teece, *Rule of Reason Analysis of Horizontal*

Agreements: Agreements Designed to Advance Innovation and Commercialize Technology, 61 Antitrust L.J. 579, 606 (1993). The authors argued that the rule requiring proof of market power in vertical cases should be applied as well to horizontal restraints. However, the decisions cited by the authors do not stand up under close examination as authority for their proposal and rarely involve true horizontal restraints.[14]

A. The Courts of Appeals do not rely on Market Power in their analysis of Horizontal Restraints.

The majority of the Courts of Appeals have resisted attempts by antitrust defendants to assert purported lack of market power as an excuse for horizontal restraints of trade. *Detroit Auto*, 955 F.2d 457; *Reazin*, 899 F.2d 951, *aff'g*, 663 F.Supp. 1360, 1416 (D.Kan. 1987) (interpreting *Dentists* to reject threshold inquiry into market power when "anticompetitive potential" of restraint established); *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990); *French*, 885 F.2d 1392, 1405 (Farris, J., concurring) ("The crucial point is that neither market definition nor the traditional methods of market definition are essential to proving anticompetitive effect.", citing *Dentists); Hahn*, 868 F.2d 1022; *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) ("Defining the market is not the aim of antitrust law; it merely aids the search for competitive injury. . . [T]he failure to pinpoint precisely the relevant market through detailed market analysis is not uniformly fatal to a claim under Sherman Act § 1."); *Miller v. Indiana Hosp.*, 843 F.2d 139 (3rd Cir.), *cert. denied*, 488 U.S. 870 (1988); *National Bancard Corp. v. VISA, U.S.A., Inc.*, 779 F.2d 592, 604 (11th Cir.) ("the [Supreme] Court [citing *Dentists*] apparently intended to require some competitive justification of certain restraints regardless of market power"), *cert. denied*, 479 U.S. 923 (1986); *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C.Cir. 1984) (availability of less restrictive alternatives invalidated rule requiring members of association to limit

[14] The law review article was submitted by letter 5 months after oral argument and in effect constituted a supplemental brief to which no substantial response was possible.

practice exclusively to periodontics). *Accord*, L. Sand, et al., *Modern Federal Jury Instructions*, Revision 15, February 1992, V.3 ¶ 79.04, Comment to Instruction 79-44 (recommending no instruction on market power as a threshold requirement in horizontal cases, but pointing out that several Circuits do apply such a rule in vertical cases).

These cases share several principles in common with the exclusion of Capital from membership in MVMA. First, an organization of competitors excluded a group of providers, here specialists outside the five county area. Second, plaintiffs were purposefully being excluded to limit competition. Third, the restraint at issue had anticompetitive potential. Fourth, there was no procompetitive justification for the restraint. Fifth, less restrictive alternatives to the restraint on competition were available. *Cf. Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 973 (1992) (showing of market power necessary when challenged practice can enhance competition and does not exclude class of providers).

B. Reliance on market power is inappropriate in analysis of joint ventures.

The rejection of market power as a necessary element in Rule of Reason analysis of joint ventures has deep historical roots. In *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Judge (later Chief Justice) Taft formulated the doctrine holding that restraints not reasonably ancillary to the procompetitive purpose of a joint venture are invalid.

> [A] union which reduces competition [should be sustained] when the main purpose of [the] union of their capital, enterprise, and energy [is] to carry on a successful business, and one useful to the community. . . . [N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract . . .

Id. at 280, 282. The Court in *Addyston* invalidated the restraint of trade based upon its improper purpose, notwithstanding a claim that the combination lacked market power. *Id.* at 279.

A strong contemporary advocate for joint ventures agrees:

> [R]estraints among competitors that are broader than required for the legitimate purpose of the transaction should be void. Such "naked" restraints cannot be justified by the legitimacy of the transaction.

T. Piraino, *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 55 (1991). *Accord*, *Bancard*, 779 F.2d 592 at 602 ("The [rule] is 'reasonably ancillary to [a] procompetitive, efficiency-creating endeavor[] and therefore not a naked restraint of trade.' ").

Since all horizontal restraints eliminate some rivalry between competitors, *Rothery*, 792 F.2d at 229, analysis must focus upon whether the restraint has a purpose consistent with or truly ancillary to the countervailing procompetitive aspects of a lawful joint venture. "Even if the parties have a small market share, they should not be permitted to restrain competition outside the proper bounds of their joint venture." Piraino, *supra*, at 56.

An exclusionary horizontal restraint which has an overt anticompetitive purpose and lacks any offsetting procompetitive justifications cannot survive antitrust scrutiny. Market power comes to the fore only when a procompetitive justification exists. Indeed, as the FTC has pointed out, in refusing to approve an IPA rule closing membership once a certain number of physicians had been attained, the type of practice in which MVMA engaged actually undermines the basic legitimacy of an IPA-model HMO.

> You state that having too many physicians makes it difficult for the Plan to perform effective utilization review . . . . It is difficult, however, to give substantial weight to this rationale when proffered by a plan that apparently will continue to represent and permit participation by virtually all of the current market participants, but plans to exclude all - and only - new

> entrants in various specialties. . . . Specifically, the proposal will exclude all new physicians, regardless of their individual cost consciousness, utilization patterns or other practice characteristics, without necessarily strengthening utilization controls regarding those physicians already participating in the Plan nor conditioning their continued participation in the Plan on adherence to stricter utilization controls.

Staff Advisory Opinion, March 26, 1984.[15]

The Courts of Appeals need further guidance from this Court concerning the role of market power in horizontal cases.

> Whether the court, in applying the rule of reason, must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law. Cases can be cited for both sides of the proposition.

Bancard, 779 F.2d at 603. The Court of Appeals in the present case noted that "[t]he precise role that market power plays in rule of reason analysis of horizontal combinations or conspiracies is a matter of some dispute." 996 F.2d at 546. *See also Dick*, 890 F.2d 139, 164 (Norris, J. dissenting).[16]

C. Reliance on market power in a horizontal case is contrary to important antitrust policies.

The Court of Appeals' use of market power to dismiss a complaint alleging a horizontal restraint sets a dangerous precedent

---

[15] In contrast to the Second Circuit, Judge Bork's opinion in *Rothery* did identify a procompetitive justification. "The Atlas network involves a union of the parties' enterprise to carry on a useful business, the challenged restraints are ancillary in that they enhance the efficiency of that union by eliminating the problem of free ride, and, given Atlas' small market share, cannot be part of a plan to gain monopoly control of the market." 792 F.2d at 224.

[16] The provocative dissent in *Dick* discussed a restriction on production imposed on only one parcel of property under the terms of a lease arrangement. The majority saw no market effect if only one producer were affected. This is lack of market power in the extreme. Nevertheless, the 6-5 vote indicates that the result may not be correct. Moreover, the restraint imposed on Capital hardly is limited to one competitor.

inimical to free competition. If the ruling stands, competing firms can combine to carve out for themselves exclusive access to a sector of the market, whether that sector of the market is defined by geography, by means of distribution, or otherwise.

For example, if an influential association of local subcontractors persuaded a general contractor to delegate to it the right to set bidding standards, then it could deny participation to all non-member subcontractors. Supermarkets could delegate to a select group of manufacturers exclusive control over which products to place on their shelves. A group of manufacturers could form a cartel to gain control over a particular avenue of distributing a product and then deny all others access to it. Under the Court of Appeals' approach, these exclusionary practices would be valid, so long as aggrieved competitors are not completely foreclosed from all access to the market.

This has never been the law and should not become the law. *See*, *Topco*, 405 U.S. 596 (invalidating rule of cooperative of small grocery chains which denied membership to those unwilling to accept territorial limitations on their promotion of cooperative's private label brands in competition with products of large grocery chains). The Second Circuit's formulaic approach, which would permit all forms of exclusionary behavior in the absence of empirical evidence of market impact, is contrary to important antitrust policies. *E.g.*, L. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 Calif. L. Rev. 835 (1987).

The important distinction between sections 1 and 2 of the Sherman Act should be preserved.

> Under Section 2, the existence or exertion of power to accomplish the desired anticompetitive objective must be present. Under Section 1, the mere fact of a contract, combination or conspiracy in restraint of trade gives rise to antitrust liability. **Thus, the Section 1 violation may be established irrespective of whether the parties have power to carry out their unlawful purpose.**

2 E. Kintner, *Federal Antitrust Law*, § 9.3, p. 6 (1980) [Emphasis added]. Here, the Court of Appeals ruled that MVMA

desired to harm competition, but was simply mistaken in its own assessment of its ability to do so. When defendants have effected a naked restraint on competition, without offsetting pro-competitive justification, and "the most [they] can say for themselves is that they tried to harm the public but were mistaken in their ability to do so," their conduct should be condemned under the antitrust laws. 7 P. Areeda, *Antitrust Law*, ¶ 1509, p. 411 (1986).[17]

Horizontal exclusions are particularly pernicious because the cooperative efforts of competitors impose restraints and create market power that could not previously exist.

> [Market] power cannot be evaluated in a vacuum, independent and prior to analysis of the alleged exclusionary conduct. It is the exclusionary conduct which creates the market power being evaluated, not the other way around.

T. Krattenmaker, R. Lande, and S. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Georgetown L. Rev. 241, 255 (1987). *Accord*, P. Areeda, *supra*, ¶ 1437 (1986).[18] The creation of market power is evident in the present case. 70% of the physicians in a five county area expressed their belief that MVMA was an important player in the market by joining the organization. See FTC, *Statement of Enforcement Policy, Physician Agreements to Control Medical Prepayment Plans*, 46 Fed.Reg. 48982-06 (1981); FTC, *Staff Advisory Opinion*, *supra* (percentage of physicians determinative of market power).

Professor Areeda has repeatedly stated that market definition is not an end in itself. "Market definition is only a means to an end." P. Areeda, *Market Definition and Horizontal Restraints*, 52 Antitrust L.J. 553 (1983). His critics have noted that Professor

---

[17] The author refers specifically to price-fixing but his logic applies with equal vigor to all direct attacks on the competitive process.

[18] In contrast, vertical restraints do not increase market power but simply reflect the existing power of an entity to impose its will in the marketplace. *Id.*

Areeda has "argued persuasively that market share data are primitive, and often misleading indicators of market power." J. Shenefield, *A Response to Professor Areeda*, *id.* at 587.

This Court has agreed.

> '[M]arket power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.'

N.C.A.A., 468 U.S. at 110, fn. 42 (quoting brief of Solicitor General as *amicus curiae*).

The Court of Appeals' decision that market power is always a highly relevant factor, even in analyzing a horizontal restraint lacking any procompetitive virtue, is based on a simplistic economic model which does not provide a meaningful assessment of how firms actually behave in the marketplace. The Court accepted an abstract theory that anticompetitive conduct will be unprofitable in the long run for firms who lack market power to impose their will in the marketplace. "The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of supply enter the market." 996 F.2d at 546 (quoting Jorde & Teece, *supra*, at 602-03). Whatever utility this principle may have in the world of Adam Smith, it does not reflect modern health care markets where certain unique factors, such as physicians' extraordinary ability to influence market conditions, have made these markets notoriously uncompetitive. Kauper, *supra*, at 273-287 (noting that market imperfections may generate market power); T. Greaney and J. Sindelar, *Physician-Sponsored Joint Ventures: An Antitrust Analysis of Preferred Provider Organizations*, 18 Rutgers L. J. 513 (1987). This Court has recognized that abstract economic models divorced from the particular market at issue cannot be determinative in antitrust analysis. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S.Ct. 2072 (1992).

The Second Circuit's holding that plaintiff must always prove either market power or quantitative harm to the market risks turning antitrust cases into a battle of expert opinion even at the summary judgment stage. Both courts and commentators have criticized the belief that expert opinion should always be essential to an antitrust case.

> Defining markets and determining the presence of market power is not socially costless. Using up the time and energy of courts and lawyers wastes resources when the challenged conduct of a pernicious type lacks any offsetting legitimate objective.

7 P. Areeda, *Antitrust Law*, ¶ 1509, p. 411 (1986). *Accord*, *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982); *French*, 885 F.2d 1392 at 1404 (Farris, J., concurring); Piraino, *supra*, at 19 (1991).

III. THE COURT OF APPEALS FAILED TO CONSIDER THE IMPACT OF THE EXCLUSION UPON CONSUMERS

The conspiracy, by interfering with the competitive process, deprived consumers of a choice they would have had in its absence. This injury to the market is fundamental to analysis under the Sherman Act. Whether Capital was individually harmed and whether respondents' market power enabled them to realize an immediate benefit from their misconduct are equally irrelevant.

The Court of Appeals equated an end of antitrust analysis, *i.e.* establishing anticompetitive effect, with certain means for showing such effect. Detailed market analysis, whether focussed on market power or empirical evidence of harm to the market, cannot serve as a shortcut to avoid the Rule of Reason balancing test for the evaluation of harm to the market. When there is no procompetitive justification to balance against the expected anticompetitive effect of a practice, the Rule of Reason requires that summary judgment be denied.

Moreover, the Court of Appeals' demand for empirical or quantitative evidence of diminution in the quality of radiology services provided to MVP insureds, 996 F.2d at 546-47, requires an antitrust plaintiff to do the impossible.

> [T]he appropriate quality of care is in most instances virtually impossible to define. . . . Quality is in the eye of the beholder or, more particularly, the consumer. . . .**[D]efendants have contended that they should be absolved because their conduct did not raise prices, restrict output, or lower the quality of the product.** But these theoretical principles are of little utility in antitrust analysis. Quality changes cannot normally be measured. It is unlikely that they can be characterized as good or bad.

Kauper, *supra*, at 276, 294.[19] [Emphasis added]

Defendants' own conduct establishes that there is an issue of fact as to the anticompetitive effect of the restraint. "Where those who know a market act for the avowed purpose of restraining it, their intention is some evidence that adverse effects will occur." Kauper, *supra*, at 308. "The market impact of horizontal competitive restrictions can often be inferred from the purposes of the parties to the restraints." Piraino, *supra*, at 24.

By citing to *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 617 (1991), the Court of Appeals revealed its misunderstanding of the role of empirical evidence in Rule of Reason analysis. In *Bhan*, a hospital decided to use only physician providers of anesthesiology services, to the detriment of nurse anesthetists. The restraint was not characterized as naked because the "activity does not appear to be one that is always anti-competitive." *Id.* at 1412. Indeed, the use of more learned physician providers could actually improve competition and quality "by making Manteca [Hospital] a more attractive competitor in the market." *Id.* It was the ambiguous nature of the restraint that caused the Ninth Circuit

---

[19] Plaintiffs provided proof in the record as to differences in quality of care [A448-50, 459-60], and Dr. Meiselman of MVMA agreed that such differences did exist. [A574-78]

to find deficiencies in plaintiff's proof. *Compare Bahn with Hahn*, 868 F.2d at 1031 (Ninth Circuit analyzed the horizontal exclusion claim under the Rule of Reason and concluded that the physicians' group "has the burden . . . of putting forward a plausible justification for its conduct.").

The Second Circuit also mistakenly applied *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984) to a horizontal restraint. *Jefferson* did not involve an exclusion from an organization of competitors, but a vertical restraint in the form of an exclusive contract.[20] The plaintiff sought to distinguish the case from ordinary vertical agreements between buyers and sellers, which are undoubtedly valid in the absence of monopolization, by arguing that the exclusive contract constituted an unlawful tying arrangement. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of the tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id.* at 12. Without market power, the seller in this vertical relationship cannot force the buyer into the undesirable choice. There was no effect on the competitive process in *Jefferson*.

The failure to demand a procompetitive justification for a horizontal combination "to insulate its members from competition" denies the Sherman Act its consumer welfare function. Section 1 protects consumers from horizontal restraints not by waiting for the appearance of some measurable quantity of harm to them but by promoting vigorous competition. If "[i]ndividual competitors lose their freedom to compete[,] price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference." *N.C.A.A.*, 468 U.S. at 108. When a combination of competitors successfully excludes unwanted competition from a sector of the market, their claim that they lack the power to extract a benefit in the form of monopoly profits does not excuse the injury to the competitive process resulting from the exclusion.

---

[20] The vertical exclusive contract between MVP and MVMA is not being challenged. 996 F.2d at 545. The complaint addresses the horizontal conspiracy to exclude Capital from membership in MVMA.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

COOPER, ERVING, SAVAGE,
NOLAN & HELLER
39 North Pearl Street
Albany, New York 12207
(518) 449-3100

PHILLIP G. STECK, *Counsel of Record*

MARK E. WATKINS, *Of Counsel*

Counsel for the Petitioners

APPENDIX

CAPITAL IMAGING ASSOCIATES, P.C., Plaintiff-Appellant,

v.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., Mohawk Valley Physicians Plan, Inc., Defendants-Appellees.

No. 414, Docket 92-7639.

United States Court of Appeals, Second Circuit.

Argued Nov. 9, 1992.

Decided June 10, 1993.

Private radiology practice brought action against health maintenance organization (HMO) and independent practice association of member physicians which had contracted to provide services to HMO's enrollees, alleging antitrust violations. The United States District Court for the Northern District of New York, Neal P. McCurn, Chief Judge, 791 F.Supp. 956, granted summary judgment for defendants, and appeal was taken. The Court of Appeals, Cardamone, Circuit Judge, held that radiologists' failed to show that their exclusion from independent practice association constituted unreasonable restraint of trade.

Affirmed.

Phillip G. Steck, Albany, NY (Mark E. Watkins, Cooper, Erving, Savage, Nolan & Heller, Albany, NY, of counsel), for plaintiff-appellant.

William J. Kopit, New York City (Clifford E. Barnes, Epstein, Becker & Green, P.C., New York City, J. Edward Neugebauer, Washington, DC, of counsel), for defendants-appellees.

Before: NEWMAN, CARDAMONE, and MAHONEY, Circuit Judges.

CARDAMONE, Circuit Judge:

We have before us on this appeal a claimed violation of the Sherman Antitrust Act. Certainly one strand of the philosophical underpinning leading to the passage of that Act is derived from the thinking of John Stuart Mill, who, in his influential essay "On Liberty," observed: "trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society," J.S. Mill, *On Liberty*, Chapt. V, 303 (Harv.Class., Eliot ed., 1909). Plainly, not all competitive conduct that injures another allows resort to laws regulating trade. Antitrust law is not intended to be as available as an over-the-counter cold remedy, because were its heavy power brought into play too readily it would not safeguard competition, but destroy it. Determining whether conduct allegedly in restraint of trade violates the Sherman Act requires careful analysis and fine discernment between those actions that generally tend to inhibit competition and those that either tend to promote it or at least not injure it. Such an analysis is our task on the present appeal.

A private radiology group brought this antitrust action in the district court against a health maintenance organization and the group of physicians organized to provide medical care to the health plan's enrollees. The radiologists complained that they were improperly excluded from providing services to the patients of the health care purveyor. Such exclusion, they argued, constituted a violation of the Sherman Act. After limited discovery, the district court granted the defendants summary judgment. In so doing, it examined only the "vertical" relationship between the health maintenance organization and its physicians' association, which the plaintiff radiologists argue was error. Although we agree with the radiology group that certain "horizontal" aspects of the defendants' practices improperly were not considered, we affirm the judgment of the district court, though for somewhat different reasons, because it reached the correct result.

BACKGROUND

A. *The Parties*

Capital Imaging Associates, P.C. (Capital, plaintiff or appellant) is a private radiology group of doctors who practice in Latham, a suburb of Albany, located at the northern tip of Albany County, New York, only a few miles from the borders of Schenectady, Saratoga, and Rensselaer Counties. Capital operates as a referral practice, that is, its physicians do not treat their own patients; rather, they supervise the performance of diagnostic radiological procedures on patients referred to the group by general clinicians, interpret the resulting images, and report their findings to the primary care physicians. The radiology group offers a full range of diagnostic imaging services, including such specialized radiological procedures as ultrasound, Magnetic Resonance Imaging (MRI), and Computerized Axial Tomography (CAT) scanning. The only comparable full-service radiology practice within a 100-mile radius of Albany County is Two Rivers Radiology, P.C. (Two Rivers), which has two offices, one in Rensselaer County and the other in Albany County directly across the street from Capital in Latham.

Mohawk Valley Medical Associates (Mohawk Valley, defendant or appellee) is an independent association of private physicians providing medical care to over 100,000 enrollees in appellee Mohawk Valley Physicians Health Plan (Plan). Mohawk Valley and the Plan were defendants at the district court. Together the physicians' association and the Plan constitute an independent practice association (IPA) model health maintenance organization (HMO). Under the IPA-HMO arrangement, the managed health care purveyor (in this case the Plan) contracts with the physicians' practice association, Mohawk Valley, to provide a full range of medical services for the HMO's enrollees, who must then go to Mohawk Valley physicians for all their medical care needs.

According to the terms of their agreement, the Plan purchases medical services from Mohawk Valley at a fixed contract or

capitation rate per individual health plan enrollee. Although the arrangement among the Mohawk Valley physicians apparently does not permit price competition among the doctors, the capitation system promotes efficiency and is viewed as procompetitive because it gives the independent practice physicians an incentive to keep medical costs down. That is, unless Mohawk Valley agrees to a sufficiently low capitation rate, the Plan will be unable to compete with other health care providers in the private insurance market, in which case the Mohawk Valley physicians will not receive a steady stream of patients and income from the HMO. *See generally U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir.1993) (describing HMO cost containment procedures).

In order to operate as an HMO in New York, the Plan was required to apply for and receive a certificate of authority from the New York State Department of Health (Department). The Department regulates HMOs to ensure that patients are afforded with comprehensive and continuous medical care. It also certifies the service area within which an HMO may offer its benefits package. *See* N.Y.Pub. Health Law § 4402 (McKinney 1985). At the commencement of this lawsuit, the Plan was licensed to operate in several central and upstate New York communities, but not in Albany County.

Mohawk Valley is also regulated by the Department. In accordance with state law it is obligated to, *inter alia*, staff itself with physicians and other health care professionals as necessary to meet the full needs of the Plan's enrollees, and to establish credential requirements for membership in its practice association. Consonant with these obligations, Mohawk Valley promulgated standards for admission of doctors into its association. To be admitted, a member physician must have (1) privileges in hospitals participating with the Plan, (2) offices within the state-certified service area, and (3) staff and facilities to provide adequate and continuous care to Plan patients. Limited exceptions to these admission requirements have been made when a pressing need exists for additional primary care physicians or specialists.

An application for membership is reviewed by the Mohawk Valley credentials committee, which makes a recommendation to its board of directors. According to the association's guidelines, the board may either approve the admission request or inform the applicant that it intends to deny it. If the board chooses the latter course, the applicant may request a hearing, during which he or she may present materials to support the application.

B. *The Complaint*

This litigation came about as a result of the denial of appellant Capital's application for membership in Mohawk Valley. Appellant alleges that on February 24, 1987 it sent a written request for admission into the practice association, which was denied on July 21 because Capital was located outside of the Plan's designated service area. According to Capital, its application was spurned without prior notice and an opportunity for a hearing before the association's board of directors, procedures mandated by Mohawk Valley's standards for admission. Moreover, appellant contends the purported reason for denial is inconsistent with the Plan's description of its service area in its promotional literature to enrollees and with Mohawk Valley's treatment of other Latham-based physicians seeking membership.

In support of that contention, Capital points out that following the veto of its admissions application, it was asked to bid on an exclusive one-year contract to provide imaging services for Mohawk Valley. In October 1987 the association's board of directors rejected Capital's bid and voted instead to award the contract to Two Rivers because Two Rivers' bid was $40 per scan lower. Appellant believes the bidding process was flawed and provides further evidence of appellees' hostility towards it.

As a result of these events, on December 5, 1988, Capital commenced the instant litigation against both appellees in the United States District Court for the Northern District of New York (McCurn, C.J.). The complaint alleged that commencing September 1986 and continuing to the present time, appellees,

along with Two Rivers and other unnamed parties, engaged in a conspiracy to exclude Capital from membership in the independent practice association. According to Capital this action constitutes an unlawful combination in restraint of trade in violation of § 1 of the Sherman Act and an attempt to monopolize trade and commerce in violation of § 2 of the Sherman Act. The complaint further alleged that these activities violate New York State's General Business Law and the common law barring unfair competition.

C. *Prior Proceedings*

Appellees made a motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) and for failure to state a claim under Rule 12(b)(6). They also moved, in the alternative, for summary judgment under Fed.R.Civ.P. 56 on the ground that there were no genuine issues of material fact. In a memorandum and order dated November 28, 1989, the district court granted the Rule 12(b)(6) motion with respect to Capital's claim of monopolization under Sherman Act § 2 because the court found it to be "against logic." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs. (Capital I)*, 725 F.Supp. 669, 678 (N.D.N.Y.1989). By contrast, it held that Capital's allegation of antitrust conspiracy under Sherman Act § 1 was sufficient to withstand a dismissal motion. With respect to this claim, the court reserved decision on appellee's motion for summary judgment and granted Capital limited discovery under Fed.R.Civ.P. 56(f) *Id.* at 679–80.

Following the completion of discovery, appellees renewed their motion for summary judgment, which the district court then granted on May 8, 1992. *See Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs. (Capital II)*, 791 F.Supp. 956, 967–68 (N.D.N.Y.1992). In so doing, the court noted that the plaintiffs demonstrated neither an illegal antitrust combination nor an unreasonable restraint of trade—the two essential elements to a § 1 claim. *Id.* at 968. The only evidence of a conspiracy to exclude Capital from membership in Mohawk Valley was the imaging award to Two Rivers and even if, as Capital

alleged, the bidding process was flawed, it did not indicate, so the district court thought, an unlawful conspiracy, especially in light of Capital's concession that the contract between Two Rivers and Mohawk Valley was not in itself an antitrust violation. *See id.* at 963–64. In reaching the conclusion that Capital failed to demonstrate an unreasonable restraint of trade, the court reasoned that the Plan's and Mohawk Valley's exclusivity practice constituted "a vertical, non-price restraint" and that such a restraint needed to be analyzed under the rule of reason. *Id.* at 964 (quoting *Capital I*, 725 F.Supp. at 677). Employing such rule, it held that Capital, "as a preliminary matter, must demonstrate that defendants have significant market power in the relevant market," and determined that the plaintiff failed to come forward with such proof. *Id.* at 966–67. The trial court stated that even though appellees' conduct may have adversely impacted appellant as an individual competitor, competition as a whole was not harmed. It refused to entertain Capital's state law claims since, having dismissed the federal cause of action, it had discretion to decline to exercise pendent or supplemental jurisdiction over them. *See id.* at 968. This appeal followed.

DISCUSSION

I Summary Judgment in the Antitrust Arena

[1] Because this appeal rises from a grant of summary judgment dismissing a complaint, we discuss the rules guiding application of that remedy in the antitrust context. Capital appeals only that portion of the final order summarily dismissing its § 1 antitrust cause of action. Several courts have noted summary disposition of antitrust cases is difficult to obtain because of their inherent factual complexity. *See Hayden Publishing Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 68 (2d Cir.1984); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 112 S.Ct. 617 (1991). But that does not mean summary disposition is thereby precluded or even disfavored in antitrust law; rather, as the Supreme Court observed in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88, 593–94,

106 S.Ct. 1348, 1355–57, 1359–60, 89 L.Ed.2d 538 (1986), summary judgment remains a vital procedural tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces. *See Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir.1991) (*en banc*), *cert. denied*, ____ U.S. ____, 112 S.Ct. 973, 117 L.Ed.2d 137 (1992); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir.1989).

Summary judgment is appropriately entered for the moving party as a matter of law when all the papers before a trial court show that there are no genuine issues of material fact. Fed.R.Civ.P. 56(c). The litigant seeking summary disposition of a case bears the initial burden of demonstrating, through affidavits or otherwise, the absence of genuine factual issues. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552–53, 91 L.Ed.2d 265 (1986). If the moving party meets its burden, the non-moving party then has the obligation to produce probative evidence supporting its view that a dispute exists. The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts..., the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita*, 475 U.S. at 586–87, 106 S.Ct. at 1355–56 (quoting Fed.R.Civ.P. 56(e)). In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct. *Id.* at 587–88, 106 S.Ct. at 1356–57; *accord Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir.), *cert. denied*, 484 U.S. 977, 108 S.Ct. 489, 98 L.Ed.2d 487 (1987).

[2] Our role is to determine whether the district court correctly ruled that there was no genuine factual issues for trial as to Capital's claim of a § 1 Sherman Act violation, thereby entitling the appellees to judgment as a matter of law. *See H.L. Hayden Co. of N.Y. v. Siemens Medical Sys., Inc.*, 879 F.2d 1005, 1011 (2d Cir.1989). In carrying out this task, we view the evidence

in a light most favorable to appellant, the non-moving party, *see Burtnieks v. City of New York*, 716 F.2d 982, 985 (2d Cir.1983), and apply a *de novo* standard of review to ensure that the substantive antitrust law was correctly applied. *See Hayden*, 879 F.2d at 1011.

II The Sherman Act, § 1

A. *Overview*

[3] In reviewing the substantive law, it is initially useful to set out the general contours of § 1 of the Sherman Act (Act), which states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States...is declared to be illegal." 15 U.S.C. § 1 (1988). Thus, according to the statute, a plaintiff claiming a § 1 violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise falls outside the purview of this provision in the antitrust law. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984); *Belfiore v. New York Times Co.*, 826 F.2d 177, 181–82 (2d Cir.1987), *cert. denied*, 484 U.S. 1067, 108 S.Ct. 1030, 98 L.Ed.2d 994 (1988). For that reason, an agreement between a parent corporation and its wholly-owned subsidiary or its agents is not a concerted action for purposes of the Act. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 104 S.Ct. 2731, 2741–42, 81 L.Ed.2d 628 (1984).

[4] If a § 1 plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason. Conduct considered illegal per se is invoked only in a limited class of cases, *see Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50, 97 S.Ct. 2549, 2551, 53 L.Ed.2d 568 (1977), where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are

"conclusively presumed illegal without further examination." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1 (1979). *Per se* violations include, for example, horizontal and vertical price-fixing, *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 60 S.Ct. 811, 841, 84 L.Ed. 1129 (1940); *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 405, 31 S.Ct. 376, 383, 55 L.Ed. 502 (1911); division of a market into territories, *see United States v. Topco Assocs.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972); certain tying arrangements, *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 104 S.Ct. 1551, 1556, 80 L.Ed.2d 2 (1984); and some group boycotts involving concerted refusals to deal with a competitor, *see Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211–12, 79 S.Ct. 705, 708–09, 3 L.Ed.2d 741 (1959). In discussing group boycotts the Supreme Court cautions against application of the *per se* rule against professional associations because the economic impact of professional activities is so difficult to track. *See Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458–59, 106 S.Ct. 2009, 2017–18, 90 L.Ed.2d 445 (1986).

[5] Most cases fall outside these narrow, carefully demarcated categories held to be illegal *per se*. In the general run of cases a plaintiff must prove an antitrust injury under the rule of reason. Under this test plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the antitrust law that was enacted to ensure competition in general, not narrowly focused to protect individual competitors. *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343–44, 110 S.Ct. 1884, 1893–94, 109 L.Ed.2d 333 (1990); *Austin v. McNamara*, 979 F.2d 728, 739 (9th Cir.1992). Were the law construed otherwise, routine disputes between business competitors would be elevated to the status of an antitrust action, thereby trivializing the Act because of its too ready availability. *See Oksanen*, 945 F.2d at 708; *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784

F.2d 1325, 1338 (7th Cir.1986) ("antitrust laws are not balm for rivals' wounds").

[6] After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of their combination. 7 Phillip Areeda, *Antitrust Law* ¶ 1502, at 371 (1986); *accord Bhan*, 929 F.2d at 1413. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole. *See Bhan*, 929 F.2d at 1413; *see also Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1493–95 (D.C.Cir.1984); Areeda, *supra*.

Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior. The classic articulation of how the rule of reason is found in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918), where Justice Brandeis speaking for the Supreme Court said:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

This classic test is easier to state than to apply. It at least seems clear that the factfinder must decide the overarching question of whether the challenged action purports to promote or destroy competition. Resolving this under the rule of reason approach requires a careful and complete analysis of the competitive effects of the challenged restraint.

Capital avers it has set forth enough facts to meet its threshold burden of showing that appellees' actions constituted an antitrust conspiracy; it also contends it has demonstrated an unreasonable restraint of trade under the rule of reason sufficient to withstand appellees' motion for summary judgment. It further asserts that in finding no horizontal antitrust conspiracy, the district court was led by this error into employing an improper analytical approach to the rule of reason, focusing too narrowly on appellees' market share.

B. *Contract, Combination or Conspiracy*

We address this contention in light of the § 1 principles just reviewed. Our attention is first directed to whether the district court's failure to find an antitrust conspiracy was predicated on its erroneous focus on the vertical relationship between the health Plan and Mohawk Valley, the physicians' group with which it contracted. *See Capital II*, 791 F.Supp. at 963; *Capital I*, 725 F.Supp. at 677. This ordinary contract between a buyer and seller of medical services at different levels in the market structure, Capital itself acknowledges, poses few antitrust problems. But, its argument goes, the district court ignored the antitrust concerns that arise from the horizontal collaboration of competing independent physicians that make up the roster of Mohawk Valley. This association of sellers of medical services, Capital continues, conspired illegally to boycott Capital, another seller of the same medical services.

Appellees have two responses to appellant's allegation of horizontal collaboration. Initially, they declare the physicians associated with Mohawk Valley are a single entity economically, incapable of forming a § 1 conspiracy among themselves.

Next they declare that even were this not to be a fact, appellant failed to proffer sufficient proof of an actual illegal horizontal boycott to negate permissible inferences of proper conduct on appellees' part.

[7] 1. *Capacity to Conspire.* The first question is – are member physicians of an independent practice association legally capable of conspiring among themselves? We think the answer is "yes," they have such a capacity. The nature of the combination here at issue is similar to that described in *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990). The plaintiff physician in *Bolt* was denied staff membership and privileges in several Florida hospitals, just as Capital here was denied membership in Mohawk Valley's practice association. Dr. Bolt filed suit alleging the defendant hospitals conspired with their medical staffs to restrain competition in violation of § 1 of the Sherman Act. The Eleventh Circuit ruled that nothing prevents members of a medical staff from conspiring, if they are so inclined, with one another. Each doctor practices medicine in his or her own individual capacity; each is a "separate economic entity potentially in competition with other physicians." *Id.* at 819; *accord Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1455–56 (11th Cir.1991).

The Fourth Circuit sitting *en banc* similarly recognized that hospital staff physicians have independent and competing economic interests. When such is the case, the court reasoned, the doctors are not a single entity, as Mohawk Valley insists it is, and have the ability "to conspire as a matter of law." *Oksanen*, 945 F.2d at 706. But in *Oksanen* the conspiratorial capacity was not found as a fact because the physicians lacked final decision-making authority, that authority having been vested in the hospital board of directors. *Id.* Hence, the defendant doctors were corporate agents of the hospital and not separate economic actors. *Cf. Copperweld*, 467 U.S. at 769, 104 S.Ct. at 2740–41.

The reasoning of *Bolt* and *Oksanen* is persuasive and we adopt it. Mohawk Valley is a multi-member association of competing

doctors, including radiologists, all of whom are in private practice for themselves and who allegedly joined together to deny Capital access to the HMO's patients. As members of an independent practice association, the doctors are not staff physicians employed by the HMO on a salaried basis, that is, they are not agents of the HMO. Instead, these health care professionals are independent practitioners with separate economic interests. *See* Clark Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1073 n. 3 (describing HMO arrangements with physicians). Accordingly, the physicians associated together in Mohawk Valley had the capacity to conspire among themselves much like the members of the medical staff in *Bolt*.

[8] 2. *Actual Conspiracy.* Our finding of a legal capacity to conspire does not resolve the issue of whether § 1 of the Sherman Act has been shown to be violated. The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred. A plaintiff must prove the defenndants illegally conspired. *See Todorov*, 921 F.2d at 1456; *cf. Monsanto*, 465 U.S. at 763–64, 104 S.Ct. at 1470–71. As stated before, this means that a plaintiff – to withstand defendants' summary judgment motion – must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants. *See Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1356–57. The plaintiff's evidence must prove the actors had an intent to adhere to an agreement that was designed to achieve an unlawful objective; it is not required that the proof show the actors specifically intended to restrain trade. *See Bolt*, 891 F.2d at 819–20.

[9] Capital has made such a showing. It has presented circumstantial evidence that Mohawk Valley excluded it from the practice association in order to insulate Mohawk Valley's member radiologists from increased competition. For example, Capital has shown that Mohawk Valley recruited primary care doctors – who, like Capital, were located in Latham – because they could attract new patients and bring increased referrals to Mohawk Valley medical specialists. By contrast, Mohawk

Valley excluded Capital's referral practice because accepting it would only increase internal competition among its members for radiology referrals.

As further circumstantial evidence of an agreement to boycott Capital, appellant demonstrated that its application for admission was denied despite its offer to open an office within the Plan's service area and despite the New York State Department of Health's lack of objection to the inclusion of a medical purveyor located outside the HMO's service area. Again, Capital noted its application was denied by Mohawk Valley without adherence to its membership admission practices, which require prerejection notification and an opportunity for a hearing. Ignoring its own written standards in the case of Capital's application for membership strongly suggests the objection to that application based on appellant's geographic location may have been a sham.

This evidence – when viewed as it must be in a light most favorable to appellant – tends to prove "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768, 104 S.Ct. at 1473. Thus, the district court erred when it failed to find a § 1 contract, combination or conspiracy. It apparently feared that such a finding would create a danger that "all HMOs would be illegal as *per se* violations of the antitrust laws." *Capital II*, 791 F.Supp. at 963. This concern is misplaced, at least with respect to the finding of a horizontal conspiracy. Our view does not interfere with either an HMO's ability to enter into vertical agreements with doctors associations or with physicians' abilities to regulate membership in practice associations for medically supportable reasons. Concluding that conspiracy was sufficiently shown in the instant case, at least for purposes of escaping summary judgment, leads to the second question in antitrust analysis: whether the defendants' action constitutes an unreasonable restraint of trade.

C. *Unreasonable Restraint of Trade*

Despite its determination that no antitrust conspiracy existed, the district court undertook an assessment of the alleged restraint

under the rule of reason. *See Capital II*, 791 F.Supp. at 964. Capital does not contend on appeal that the district court erred utilizing the rule of reason instead of the rule of *per se* illegality. It apparently recognizes that such an argument would be futile given not only the Supreme Court's caution about extension of the *per se* doctrine into new areas, see *Indiana Fed'n of Dentists*, 476 U.S. at 458–59, 106 S.Ct. at 2017–18 but also the recognized procompetitive virtues of independent practice association forms of HMOs. Rather, appellant argues the district court's inquiry was fatally flawed because it viewed the relevant restraint as being vertical in nature. This misapprehension, according to Capital, led the court to focus too narrowly on the appellees' market power and ignore the other necessary elements of a rule of reason inquiry into horizontal restraints.

[10] The precise role that market power plays in rule of reason analysis of horizontal combinations or conspiracies is a matter of some dispute. Some courts and commentators have argued for a "safe harbor" approach. Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Agreements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 Antitrust L.J. 579, 606 (1993). Under this concept, unless an antitrust plaintiff makes a threshold demonstration that the defendants possess significant market power, the defendants' cooperative effort is immune from further rule of reason inquiry. *See Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 191 (7th Cir.1985). *Compare Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C.Cir.1986) (Bork, J.) (employing safe harbor analysis), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987) *with id.* at 230 (Wald, J. concurring) (criticizing this method and arguing that reliance on market power alone is inappropriate).

The Supreme Court has never explicitly endorsed such a preclusive threshold approach. *See Indiana Fed'n of Dentists*, 476 U.S. at 460, 106 S.Ct. at 2018–19; *National Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 108–09, 104 S.Ct. 2948, 2964, 82 L.Ed.2d 70 (1984). Nor have we embraced the view that market power is the *sine qua non*

of antitrust liability. *See North American Soccer League v. National Football League*, 670 F.2d 1249, 1259–60 (2d Cir.) (market power not mentioned as threshold factor), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982); *see also State of N.Y. v. Anheuser-Busch, Inc.*, 673 F.Supp. 664, 667-68 (E.D.N.Y.1987) (assessing, in a vertical restraint case, this Court's view of the role of market power). Still, we recognize that in most cases where horizontal restraints on competition are alleged, market power remains a highly relevant factor in rule of reason analysis because market power bears a particularly strong relationship to a party's ability to injure competition. *Cf. Cox Broadcasting Corp.*, 730 F.2d at 69–70.

[11] Rule of reason analysis requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendants' conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without "detailed market analysis" by offering "'proof of actual detrimental effects, such as a reduction of output.'" *Indiana Fed'n of Dentists*, 476 U.S. at 460–61, 106 S.Ct. at 2019 (quoting Areeda, *supra*, ¶ 1511, at 429). Yet, where the plaintiff is unable to demonstrate such actual effects, it must at least establish that defendants possess the requisite market power so that their "arrangement has the potential for genuine adverse effects on competition." *Id.* Market power in that way serves as a "'surrogate for detrimental effects,'" *id.* (quoting Areeda, *supra*, ¶ 1511, at 429), because

> [f]irms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of supply enter the market. When market power is lacking, antitrust litigation is not needed to police restraints and maintain competition....

Jorde & Teece, *supra*, at 602–03.

[12] In the case at hand, Capital believes its exclusion from Mohawk Valley has had actual detrimental effects: an increase in prices for and a deterioration of the quality of radiological services to Plan enrollees. But, Capital concedes in its brief that whether or not it is admitted into the physicians' association, the fee for radiological services would remain the same. In addition, Capital failed to adduce significant evidence that its exclusion has, in fact, resulted in any decrease in the quality of radiology services to the HMO's patients. Therefore, Capital has not made an adequate showing of detrimental effects to obviate the need to show that appellees possess market power sufficient to stifle competition.

Thus, turning to the question of market power, we agree with the district court that Capital has failed to demonstrate that a genuine issue of material fact exists with respect to appellees' strength in the marketplace. Capital defined the relevant geographic market as that area lying within a 100-mile radius of Albany, New York, and it defined the product market as the market for radiological services. *See Capital II*, 791 F.Supp. at 965. Appellees have accepted theses market boundaries and have presented proof that within this 100-mile radius, the Plan's 100,500 enrollees represent only 2.3 percent of the region's HMO subscribers and Mohawk Valley's membership includes only 6.75 percent of the region's physicians. Once competition from non-HMO sources within the 100 mile radius is included, the appellees' market share drops even further to merely 1.15 percent of the total insured patient population. Capital has not contravened the *accuracy of* these figures. Consequently, it is clear that with such a *de minimis* market share, appellees lack the power to injure competition or force consumers to accept supracompetitive health care premiums or lower quality medical care.

Capital objects that reliance on these statistics is improper because Mohawk Valley competes in the market for radiology referrals and not in the health insurance market, within which the Plan competes. We disagree. The radiology referrals controlled by the appellees are those referrals emanating from the HMO's enrollees and, therefore, focusing on the HMO's share

of the consumer population is appropriate. Appellant next attempts to have us consider a new smaller geographic market within the 100-mile radius of Albany. This new market definition was not presented to the trial court and comes too late for our consideration. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Moreover, even if we were to accept appellant's attempted new market definition, Capital's cause of action still would not withstand summary judgment because it has presented us with no claim – either in its briefs or after repeated inquiries at oral argument – that it would be able to present reliable data indicating what share of this new smaller market appellees control.

Finally, appellant points out that appellees have not put forward any pro-competitive justifications for their conduct. This argument is unavailing. Such justifications are unnecessary where Capital, as the plaintiff in this case, has not carried its own initial burden of showing a restraint on competition. *See Bhan*, 929 F.2d at 1413. Only after a plaintiff has successfully met its initial burden under the rule of reason must an antitrust defendant offer evidence to exonerate its conduct.

In sum, Capital's position is simply that it has been harmed as an individual competitor. It has not shown that defendants' activities have had any adverse impact on price, quality, or output of medical services offered to consumers in the relevant market. In *Jefferson Parish*, 466 U.S. at 31, 104 S.Ct. at 1568 the Supreme Court rejected a rule of reason claim arising out the exclusion of an anesthesiologist from staff privileges at a hospital, stating that "[w]ithout a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws...." *Id.* Because no such showing has been made in the instant case, appellant's claim must also fail.

CONCLUSION

We have carefully considered all the other arguments raised by the parties and find they do not warrant further discussion

because our opinion fully disposes of them. Accordingly, for the reasons stated the order of the district court granting summary judgment to the defendants-appellees is affirmed.

CAPITAL IMAGING ASSOCIATES, P.C., Plaintiff,

v.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., and Mohawk Valley Physicians' Health Plan, Inc., Defendants.

No. 88-CV-1291.

United States District Court, N.D. New York.

Nov. 28, 1989.

Private radiology practice brought antitrust suit against health maintenance organization (HMO) and an independent practice association of member physicians organized to provide medical care to enrollees in the HMO. On motions to dismiss and for summary judgment, the District Court, McCurn, Chief Judge, held that: (1) plaintiff stated claimed under Section one of the Sherman Act, but failed to state claim of attempted monopolization; (2) plaintiff was entitled to additional time for discovery in opposition to summary judgment on the Section one claim; and (3) Rule 11 sanctions were not warranted.

Motions were granted in part and denied in part.

Cooper Erving Savage Nolan & Heller, Albany, N.Y. (Mark E. Watkins, of counsel), for plaintiff.

Epstein Becker & Green, New York City (Linda V. Tiano, of counsel), Clifford E. Barnes, Washington, D.C., for defendants.

MEMORANDUM – DECISION AND ORDER

McCURN, Chief Judge.

I. Background

A. *Parties*

Plaintiff, Capital Imaging Associates, P.C. ("Capital"), is one of only two private radiology practices offering a full range of

diagnostic imaging services in an extensive region around Albany, New York, including parts of southern Vermont and western Massachusetts. It is a major regional health care facility with annual gross receipts of $3,800,000, approximately 14% of which are reimbursed by Medicare. Plaintiff's only competitor is Two Rivers Radiology, a private radiology practice with offices located across the street from plaintiff in Latham, a community in northern Albany County, New York. Although Two Rivers is not a party to this case, it is under contract with the defendants' health insurance plan to provide a specialized radiological procedure known as Magnetic Resonance Imaging ("MRI"). It is this relationship between Two Rivers and defendants which is the foundation for plaintiff's allegations.

Defendant, Mohawk Valley Medical Associates ("Associates") is an independent practice association ("IPA") of member physicians organized to provide medical care to enrollees of defendant Mohawk Valley Physicians Health Plan, Inc. ("MVP"). The defendants together constitute an example of an IPA-model health maintenance organization ("HMO") in which an HMO (MVP) contracts with an organization of physicians (Associates) to provide physician services to the HMO members in the individual physician member offices.

B. *Complaint*

Plaintiff invokes the jurisdiction of this court under the provisions of Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15 and 26[1], to recover treble damages for and obtain

---

[1] The Clayton Act, 15 U.S.C. section 15 states in pertinent part:

> ... any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. section 15 (United States Code, Lawyers Edition, 1985)

(Footnote continued)

injunctive relief from defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2[2], and the costs of this suit including reasonable attorney's fees.

Plaintiff's complaint contains three counts. The first involves violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2. Plaintiff contends that at a date at least as early as September 16, 1986, and continuing to the present time, the defendants, Two Rivers and other unnamed co-conspirators engaged in an unlawful combination or conspiracy in unreasonable restraint of interstate commerce in violation of Section 1. This alleged combination or conspiracy consists of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to exclude plaintiff from membership in Associates and thereby unlawfully restricting plaintiff's access to the market for radiological services controlled by defendants. Plaintiff claims that in formulating and

---

The Clayton Act, 15 U.S.C. section 26 states in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws ...

15 U.S.C. section 26 (United States Code, Lawyers Edition, 1985)

[2] The Sherman Act, 15 U.S.C. section 1 states in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, ... is hereby declared to be illegal.

15 U.S.C. section 1 (United States Code Service, Lawyers Edition, 1985)

The Sherman Act, 15 U.S.C. section 2 states in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, ... shall be deemed guilty of a felony ...

15 U.S.C. section 2 (United States Code Service, Lawyers Edition, 1985).

effecting the conspiracy, the defendants and co-conspirators did those things which they conspired to do, including, *inter alia*:

> a. Held meetings at various times at which meetings defendants and co-conspirators agreed to refuse plaintiff's application for membership in Associates in violation of the Membership Procedure as provided by the By-Laws of Associates and to give plaintiff false and misleading reasons for such refusal;
>
> b. Rejected the plaintiff's application for membership in Associates in accordance with the agreement reached;
>
> c. Telephoned and otherwise contacted one another between meetings concerning such agreement.

Complaint, par 11.

In addition, plaintiff contends that defendants have engaged in unlawful conduct with the intent to monopolize and to attempt to monopolize trade and commerce in violation of Section 2. Plaintiff contends that in pursuing their attempt to monopolize the relevant market, defendants, for the purpose of injuring, destroying and eliminating plaintiff as a viable business and competitor in the market and with the economic power to exclude plaintiff and with full knowledge that such acts and conduct, if successful, would have an adverse impact on plaintiff and destroy or injure it as a viable competitor, undertook the following acts:

> a. MVP has wrongfully induced Associates to exclude plaintiff from membership in Associates;
>
> b. MVP and Associates have wrongfully rejected plaintiff's application for membership in Associates.

Complaint, par. 12.

The other two counts of the complaint are pendent state claims alleging the same activities as violations of Section 340

of the New York State General Business Law and the New York State common law against unfair competition.

C. *Health Maintenance Organizations ("HMOs")*

In order to put this case in context, it is necessary to understand how an HMO functions. An HMO is one form of a managed care delivery system. It has been described as "any arrangement for health care delivery or financing that operates on a basis other than the traditional fee-for-service system [which is] designed to control health care [costs] by increasing price competition between providers and encouraging providers to reduce utilization." Walsh & Feller, *Provider Sponsored ADS: Reducing Antitrust Liability After Maricopa*, Specialty Law Digest – Health Care 5 (Apr.1985). The growth of HMOs has been dramatic. In 1970 there were approximately 30 HMOs in the country serving three million enrollees. Today, 643 HMOs serve more than 31 million people. InterStudy, *The InterStudy Edge* 1 (June 1988). MVP currently has approximately 78,000 enrollees.

Health maintenance organizations have been widely viewed as pro-competitive entities with the capacity to substantially reduce health care costs.[3] One of the essential features of an HMO is that it selects preferred physicians and excludes others thereby creating competition among the providers of health care

---

[3] For example, in the statement of policy and purpose in enacting the New York State HMO law, the state legislators noted that:

> Encouraging the expansion of health care services options available to the citizens of the state is a matter of vital state concern. Without such an expansion, increased health insurance and other benefits will continue to escalate the costs of medical care and overload the health care delivery system. The health maintenance organization concept, through which members of an enrolled population are each entitled to receive comprehensive health services for an advance or periodic charge, represents a promising new alternative for the delivery of a full range of health care services at a reasonable cost. Defendants' memorandum, p. 5-6 note 8 quoting N.Y.Pub.Health Law section 4400 (Consol.1976).

services. Antitrust enforcement agencies consider exclusions of physicians from HMOs and other managed care delivery systems as procompetitive.[4]

In order for an entity to operate as an HMO, it must apply to the New York State Department of Health ("Department") for a certificate of authority. N.Y.Pub.Health Law section 4402.1 (Consol.1976). As part of the certification process, the Department approves the service area within which an HMO can provide its approved benefits package. N.Y.Comp.Codes R. & Regs. tit. 10, section 98.7. In additon, to expand its service area, an HMO must apply for and receive an amended certificate of authority. N.Y.Comp.Code R. & Regs. tit. 10, section 98.7(b). Pursuant to a certificate of authority issued by New York State, MVP has been certified to provide comprehensive health services in the counties of Schenectady, Saratoga, Montgomery, Fulton, Herkimer, Oneida, Madison, Dutchess, Clinton, Essex, Franklin, St. Lawrence, and Otsego. However, MVP has not been certified to provide its services in Albany County.

The Department also regulates the operation of Associates. In accordance with New York State law, an IPA is organized to contract with physicians and other providers of medical or medically-related services in order to contract with a single HMO to make such provider services available to that HMO and its enrollees. N.Y.Comp.Codes R. & Regs. tit. 10, section 98.4(b)(6)(iv). That same law prohibits an IPA from establishing or providing a comprehensive health services plan, a health maintenance organization, or hospital or health related services. Thus, in effect, an IPA exists solely to service HMO enrollees.

Associates has contracted with MVP to provide physician services in a specified service area. In accordance with state statute, Associates and MVP have entered into an agreement whereby Associates has agreed, *inter alia*, to (1) arrange for the provision

---

[4] Defendants' memorandum p. 6 quoting J. Paul McGrath, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks Before the 33rd Annual Bar Association Antitrust Spring Meeting (Mar. 22, 1985).

of physician and other health professional services at such times and in such locations as MVP may require to satisfy the needs of its members; (2) establish credentialling requirements for membership in Associates; (3) maintain contracts with a sufficient number of physicians to guarantee its ability to delivery health services; and (4) arrange for member accessibility to all health services in the service area. N.Y.Comp.Codes R. & Regs. tit. 10, section 98.2(aa). Pursuant to this agreement, Associates' service area includes the counties of Schenectady, Fulton, Montgomery and Saratoga.

To fulfill the requirements of its Agreement with MVP, Associates has adopted a Membership Procedure which incorporates the credentialling requirements stipulated in the Agreement. The Associates Membership Procedure requires that in order to be admitted to membership in Associates, a physician, among other requirements, must: (1) have admitting privileges at a participating hospital; and (2) have an office in the MVP service area. However, there are limited exceptions to both of these requirements. For example, an applicant without privileges at a participating hospital may nevertheless qualify if he/she submits to Associates a supplementary application along with a letter from a participating physican confirming an arrangement to provide inpatient care at a participating hospital. Similarly, if an applicant does not have an office in the certified service area, as a matter of policy, Associates will accept such physicians when the following three conditions exist: (1) there is a deficiency of providers located within the service area; (2) the out-of-service-area provider has privileges at a participating hospital; and (3) the provider agrees to refer patients to participating providers. In order to meet its obligations to assure adequate physician services in the service area, Associates has accepted physicians for membership whose offices are out of the service area when there is not an adequate number of physicians within the service area. On these occasions, however, this need has been filled by physicians who have privileges in participating hospitals and who agree to refer patients to participating providers.

II. Statement of Facts

This action arises as a result of defendants' alleged exclusion of plaintiff from their health insurance plan. Plaintiff made written application for participation in defendants' health insurance plan by letters dated September 16, 1986 and February 24, 1987. The letter of February 24, 1987 was reviewed by Associates' Membership/Credentials Committee and referred to Associates' board of directors for consideration. Associates' board of directors denied plaintiff's application without giving plaintiff notice of its intention to do so and without giving plaintiff an opportunity to submit additional information or to request a hearing as required by the Associates' Bylaws. Furthermore, Associates' board of directors did not inform plaintiff of its action or provide a written statement of its reasons until plaintiff asked it to do so. When Associates finally did reply to this request, the reason given for its refusal was plaintiff's location outside MVP's "designated service area." Plaintiff contends that this reason is inconsistent with MVP's description of its service area in its own promotional materials and with MVP's treatment of other physicians with offices in Latham, New York.

After plaintiff's attorney communicated with MVP, defendants' attorney responded with additional justifications for Associates' denial of plaintiff's application, i.e., that the Department would neither permit MVP to enroll Albany County residents nor require it to make arrangements with providers located in Albany County and that MVP already had made adequate provision for radiological services in its service area. Associates continued to resist plaintiff's efforts to obtain acceptance as a participating provider and sought a ruling from the Department. The Department responded in writing that it would offer no objection to any arrangement that Associates might choose to make with plaintiff as a participating provider although it would not require such a relationship.

Plaintiff contends that Associates' refusal to allow it to participate in its provider network effectively denies plaintiff the ability to compete for radiology referrals from Associates' participating physicians. In addition, plaintiff contends that its

inability to compete for radiology referrals denies Associates' participating primary care physicians and specialists the ability to choose among radiologists on the basis of quality and service. Finally, by denying plaintiff the means to finance the maintenance and replacement of its sophisticated and costly diagnostic imaging equipment, plaintiff contends that its exclusion threatens to allow Two Rivers to establish a monopoly position in a regional market for radiological services.

III. Discussion

A. *Motion for judgment on the pleadings or, in the alternative, for summary judgment*

Defendants have moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) on the following grounds: (1) that the court lacks subject matter jurisdiction, Fed.R.Civ.P. 12(b)(1), and (2) that the complaint fails to state a claim against defendants upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). In the alternative, defendants have moved for summary judgment pursuant to Fed.R.Civ.P. 56 on the ground that there are no genuine issues of material fact.

[1] In making this motion, defendants contend that the only applications pertinent to this case are those of the individual physician members of plaintiff. Since Associates has taken no action on these applications, defendants contend that there is no controversy between the parties and therefore this case is not ripe for adjudication and must be dismissed for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). They also contend, in the alternative, that even if the application in question is that of plaintiff itself, there is no controversy since plaintiff never filed an application.

Although plaintiff has not completed a formal application form to request membership in Associates, correspondence between the parties served the same purpose. Plaintiff first sought participation in Associates in September 1986 and applied again by letter dated February 24, 1987. In a letter sent by Associates to plaintiff, the plaintiff was informed that application forms

would not be necessary and that Associates would make its decision on the basis of the February 24, 1987 letter. In a letter dated July 21, 1987, MVP informed plaintiff that it could not offer membership at that time.

Defendants contend that since they later provided plaintiff's member physicians with membership application forms, and the forms have not yet been processed, plaintiff's claim is not yet ripe for review. It is the opinion of the Court that the defendants have in substance, if not in fact, rejected plaintiff's application, and thus defendants' position is without merit as it relates to their motion pursuant to Fed.R.Civ.P. 12(b)(1).

[2] The second arm of defendants' motion is based on Fed.R.Civ.P. 12(b)(6) on the ground that the complaint fails to state a claim upon which relief can be granted. In reviewing a motion under Rule 12(b)(6), the court is limited to an examination of the complaint, must accept all allegations of fact as true, and must resolve all doubts in favor of the plaintiff. *Portland Retail v. Kaiser Foundation*, 662 F.2d 641, 647 (9th Cir.1981), *cert. denied*, 469 U.S. 1229, 105 S.Ct. 1230, 84 L.Ed.2d 368 (1985). In addition, for the court to grant this motion it must appear to a certainty that plaintiff could prove no set of facts entitling it to relief. *Jacksonville Newspaper Printing Pressman & Assistants Union No. 57 v. Florida Publishing Co.*, 340 F.Supp. 993 (1972), *aff'd*, 468 F.2d 824 (1972), *cert. denied*, 411 U.S. 906, 93 S.Ct. 1531, 36 L.Ed.2d 196 (1973). In antitrust cases, in particular, it must appear on the face of the complaint that plaintiff could prove no set of facts to sustain recovery. *Ware v. Associated Milk Producers, Inc.*, 614 F.2d 413 (5th Cir.1980). The complaint need only allege sufficient facts to state the elements of injury from an act prohibited by the antitrust laws. *Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 2831, 100 L.Ed.2d 931 (1988). On the other hand, for the court to sustain this motion, a defendant in an antitrust case must meet a more stringent standard because the proof is often in the hands of the conspirators, and the plaintiff may need an opportunity to discover the facts necessary to withstand the motion. *HRM, Inc. v. Tele-Communications, Inc.*,

653 F.Supp. 645 (D.Colo.1987); *Hughes Auto v. Mid-Atlantic Toyota Dist., Inc.*, 543 F.Supp. 1056 (D.Md.1982).

Plaintiff contends that under these guidelines its complaint alleges sufficient facts to withstand defendants' motion. Even defendants concede that the complaint adequately alleges a conspiracy; however, they insist that the complaint is deficient for failure to allege any anti-competitive effect. In response to this charge, plaintiff states that its complaint does in fact allege the following anti-competitive effects:

> (a) restraint of plaintiff's ability to provide radiological services for the enrollees of MVP;
>
> (b) restraint of plaintiff's ability to compete for referrals from members of Associates;
>
> (c) impairment of its ability to maintain arrangements for use and replacement of diagnostic imaging equipment;
>
> (d) deprivation of the benefits of competition to the users of radiological services and facilities; and
>
> (e) a direct, substantial and unreasonable burden upon interstate commerce.

Complaint, par. 14.

Furthermore, plaintiff claims that these allegations are "wholly adequate to state a section 1 claim". *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678 (4th Cir.1983), *cert. denied*, 464 U.S. 890, 104 S.Ct. 231, 78 L.Ed.2d 224 (1983), *reh'g denied*, 464 U.S. 1003, 104 S.Ct. 512, 78 L.Ed.2d 700 (1983). Also, it claims that restraints of trade "inherently involve injury to the public and competition." *Mishler v. St. Anthony's Hosp. Sys.*, 694 F.2d 1225, 1228 (10th Cir.1981), citing *Alameda Mall, Inc. v. Houston Lighting and Power Co.*, 615 F.2d 343, 351 (5th Cir.1980), *cert. denied*, 449 U.S. 870, 101 S.Ct. 208, 66 L.Ed.2d 90 (1980).

[3] There are two elements essential to a claim under Section 1 of the Sherman Act: (1) a "contract, combination or conspiracy," and (2) an unreasonable restraint of trade. *See Jim Forno's Continental Motors, Inc. v. Subaru Distribs. Corp.*, 649 F.Supp. 746 (N.D.N.Y.1986).

Defendants concede in their motion papers that plaintiff has sufficiently alleged a "contract, combination, or conspiracy" under the meaning of Section 1, but maintain that plaintiff has failed to sufficiently allege an unreasonable restraint on trade.

On its face, Section 1 of the Sherman Act prohibits every "restraint of trade." The courts have construed this provision, however, as prohibiting only those combinations which *unreasonably* restrain competition. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1283 (7th Cir.1983); *Jim Forno's*, 649 F.Supp. at 753.

[4] Some types of conduct are considered *per se* unreasonable. Activities that have been identified as *per se* unreasonable restraints on trade are price fixing, group boycotts, market allocation, and certain types of tying agreements. *See Bunker Ramo*, 713 F.2d at 1284; *see also Jim Forno's*, 649 F.Supp. at 753. The hallmark of a *per se* offense is that the practice at issue appears on its face to be one that would almost always act to restrict competition within a market. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562-63, 60 L.Ed.2d 1 (1979); *Jim Forno's*, 649 F.Supp. at 753.

[5] Plaintiff has alleged that defendants' activities constitute an illegal group boycott and an illegal tying agreement. However, the defendants' type of exclusivity practices are vertical, non-price restraints that are analyzed not under the *per se* rule, but under the "rule of reason" standard. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59, 97 S.Ct. 2549, 2561-2562, 53 L.Ed.2d 568 (1976); *Ralph C. Wilson Indus. v. Chronicle Broadcasting*, 794 F.2d 1359, 1363 (9th Cir.1986).

[6] The rule of reason standard "focuses directly on the challenged restraint's impact on competitive conditions."

National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1977). It is not enough for the plaintiff to show that it was harmed in its capacity as a competitor. As the Supreme Court stated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977), "[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (emphasis in original). The antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962) (emphasis in original). In other words, "it is injury to the market, not to individual firms, that is significant." *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983). This court has previously held that to adequately allege a restraint of trade under the rule of reason, a plaintiff "must at least suggest the size of the relevant product and geographic markets, the amount of competition foreclosed, and how the acts of the defendants affected that competition." *Jim Forno's*, 649 F.Supp. at 754. *See also Bustop Shelters, Inc. v. Convenience and Safety Corp.*, 521 F.Supp. 989, 997 (S.D.N.Y.1981).

[7] In analyzing plaintiff's allegations under the foregoing principles of antitrust law, it is clear that the bulk of plaintiff's claim – that *plaintiff* is or will be harmed by defendants' agreement with Two Rivers – is not "antitrust injury." Plaintiff is not entitled to relief for losing out to another competitor, namely Two Rivers, in the agreement to provide MRI services for defendants.

[8] However, plaintiff has identified the geographic and product markets in its complaint as the sale and use of diagnostic imaging equipment in the United States, or more specifically in its statement pursuant to Rule 10(j) of the Local Rules of the Northern District of New York, as the market for referrals to private diagnostic radiology centers offering a complete range of diagnostic imaging technology in an area within a radius of at least 100 miles from Albany, New York.

In addition, plaintiff has alleged in its complaint that defendants' activities deprive the benefits of competition to users of radiological services and facilities. Plaintiff adds in its Rule 10(j) statement its related contention that the arrangements between MVP and Associates do not permit Associates' participating physicians to refer their MVP-enrolled patients to plaintiff's radiologists for radiology services.

The court determines that these latter allegations are at least sufficient to avoid defendants' motion to dismiss plaintiff's Section 1 claim under Fed.R.Civ.P. 12(b)(6).

[9] Having determined that plaintiff has alleged some antitrust injury, we now consider its claim under Section 2 of the Sherman Act. The essential elements of attempted monopolization under Section 2 are (1) a "dangerous probability of success" in monopolizing a given product market and (2) a specific intent to "destroy competition or build a monopoly." *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir.1980), citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953). Plaintiff's allegations of defendants' attempt to monopolize the market for the sale and use of diagnostic imaging equipment in the United States or the market for referrals to private diagnostic radiology center in the Albany area are wholly insufficient to withstand defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6).

It is clear to this court that plaintiff and defendants are not competitors. Plaintiff is in the business of selling radiological services; defendants are not. Defendant MVP buys medical services from providers and sells them to subscribers, and competes against other IPAs which do the same thing. Defendant Associates is an organization of physicians who provide medical care to enrollees of MVP. Not only is there no *dangerous probability* that defendants will succeed in monopolizing the markets identified by plaintiff, there is no present *possibility* defendants will do so.

Because we hold that plaintiff has failed to establish a "dangerous probability of success" as a matter of law, it is

unnecessary to consider the question of defendants' intent. However, notwithstanding plaintiff's lack of evidence of an intent to monopolize plaintiff's market, defendants would certainly benefit from greater, rather than less competiton between radiological services providers. Thus, the suggestion that defendants intend to eliminate one of those providers is against logic.

The court next considers defendants' alternative motion to grant summary judgment as to plaintiff's Section 1 claim.

[10] Generally, motions for summary judgment are disfavored in antitrust cases. *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970) (the party seeking summary judgment must *conclusively* show the absence of genuine issues of material fact and the plaintiff is given the benefit of *all reasonable inferences*) (emphasis added); *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir.1984). The classic expression of the courts' extreme reluctance to grant summary judgment motions in antitrust cases is found in *Poller v. CBS*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1961) where the Supreme Court stated:

> Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Id. at 472-73, 82 S.Ct. at 490-91.

Furthermore, a defendant seeking summary judgment has the initial burden to offer an adequate explanation of a legitimate alternative basis for its conduct. *Smith v. Northern Michigan Hosp.*, 703 F.2d 942, 948 (6th Cir.1983) citing *First National Bank v. Cities Service*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968), *reh'g. denied*, 393 U.S. 901, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968). Plaintiff contends that defendants have failed to sustain this burden. Moreover, plaintiff argues that the

antitrust plaintiff, in opposing a motion for summary judgment, must merely offer significant probative evidence supported by reasonable inferences. *Trident Neuro-Imaging Lab. v. Blue Cross*, 568 F.Supp. 1474, 1478 (D.S.C.1983).

Defendants have provided a legitimate alternative basis for their conduct, i.e., defendants require a limited amount of radiological services, and Two Rivers was the successful bidder for those services over plaintiff.

As previously noted, defendants have conceded that plaintiff has offered sufficient proof of a "contract, combination or conspiracy" under Section 1. And while we have held that plaintiff has *alleged* a restraint on trade sufficient to defeat the motion to dismiss, plaintiff has failed, at this stage, to come forth with any proof of the impact of defendants' actions on competitive conditions sufficient to defeat a motion for summary judgment.

B. *Cross-motion to continue action pending discovery*

Plaintiff has requested by cross-motion, that in the event the court is inclined to grant summary judgment, the court issue an order pursuant to Fed.R.Civ.P. 56(f) continuing the hearing on defendants' motion until plaintiff shall have had an opportunity to conduct discovery in accordance with the stipulated case management order dated February 24, 1989.

[11] Under the Federal Rules, the notice pleading requirements of Fed.R.Civ.P. 8 are "inextricably intertwined" with the functioning of all pre-trial procedures, including those for discovery and free amendment of pleadings. 5 Wright & Miller, *Federal Practice and Procedure*, section 1202. In *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388, 91 L.Ed. 451 (1946), the Supreme Court stated that the purpose of pleading is general notice-giving while the purpose of discovery is to "narrow and clarify the basic issues between the parties," and to ascertain "the facts, or information as to the existence or whereabouts of the facts, relative to those issues." In addition, implicit in the text of Rule 56 is a requirement of sufficient time for discovery.

Portland Retail v. Kaiser Foundation, 662 F.2d 641 (9th Cir.1981), *cert. denied*, 469 U.S. 1229, 105 S.Ct. 1230, 84 L.Ed.2d 368 (1985); *see also McDaniel v. General Motors Corp.*, 480 F.Supp. 666, *aff'd*, 628 F.2d 1345 (1979); *Argus v. Eastman Kodak*, 552 F.Supp. 589 (S.D.N.Y. 1982), *aff'd* 801 F.2d 38 (2d Cir.1986) (an affidavit showing that the opposing party is unable to state facts because no discovery has yet been had is sufficient to defeat a motion for summary judgment).

Plaintiff has demonstrated by sworn affidavit a reasonable basis for the essential allegations of its Section 1 conspiracy claim in its complaint and has a "reasonably founded hope that the process will reveal relevant evidence." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 95 S.Ct. 1917, 1928, 44 L.Ed.2d 539 (1975).

[12] Further, even a plaintiff who has had an opportunity for general discovery may, when met with a motion for summary judgment, show a need for additional discovery under Fed.R.Civ.P. 56(f). In an antitrust case, where plaintiff shows by affidavit the areas in which discovery is necessary, summary judgment is premature and an order granting a motion for summary judgment is an abuse of discretion. *Glen Eden Hosp. v. Blue Cross & Blue Shield*, 740 F.2d 423 (6th Cir.1984). Plaintiff contends that the affidavit of Michael E. Berlow shows that discovery is necessary to obtain information with respect to the characteristics of the market for referrals for radiological services, Associates' penetration of that market through its provider network, and the arrangements among MVP, Associates, Two Rivers and other co-conspirators.

Although defendants maintain that summary judgment can be granted without discovery, they ask that if this court determines that discovery under Fed.R.Civ.P. 56(f) is appropriate, the scope of such discovery be limited to only those controverted facts which could create genuine issues of material fact (these are identified in the Affidavit of Mark E. Watkins in Support of Cross-Motion Pursuant to Rule 56 ("Watkins Affidavit")). Moreover, they ask the court to place a reasonable limit on the

amount of time plaintiff has to conduct the requested limited discovery.

[13] Rule 56(f) establishes a procedure to enable a party additional time to obtain limited discovery in order to file an opposition to a summary judgment. *Contemporary Mission Inc. v. U.S. Postal Service*, 648 F.2d 97 (2d Cir.1981). Also. Rule 56(f) discovery is specifically designed to enable a plaintiff to fill material evidentiary gaps in its case in an effort to withstand summary judgment. *Michael Rose Productions, Inc. v. Loew's Inc.*, 141 F.Supp. 257, 263 (S.D.N.Y.1956). However it does not permit a plaintiff to engage in a "fishing expedition." *Waldron v. Cities Service Co.*, 361 F.2d 671, 673 (2d Cir.1966), *aff'd sub nom. First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 *reh'g denied*, 393 U.S. 901, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968). Thus, in considering a Rule 56(f) motion, the court, in the exercise of its discretion, must determine whether or not to grant a continuance to enable the plaintiff to obtain certain requested additional discovery. In effect, the court must determine "whether to postpone the presentation of the motion [for summary judgment] because [plaintiff] claims that discovery will enable him to resist it." *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 10 Fed.R.Serv. 2d 826, 828 (S.D.N.Y.1966). In addition, if the court decides to grant such a continuance, it must also determine the appropriate scope and manner of such discovery. *Sam Wong & Son, Inc. v. N.Y. Mercantile Exchange*, 735 F.2d 653, 678 (2d Cir.1984).

[14, 15] To fulfill the requirements of Rule 56(f), the plaintiff must through affidavit (1) identify the specific controverted facts which are the basis of the discovery request; and (2) show that such controverted facts could create a genuine issue of material fact sufficient to defeat the defendants' summary judgment. *Paul Kadair Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1028 (5th Cir.1983). In addition, "[a]s [the plaintiff] is the party moving for discovery under Rule 56(f) he, like any other moving party, has the burden of supporting his motion." *Skouras*, 10 Fed.R.Serv.2d at 828. In compliance with these requirements,

the plaintiff has identified its "controverted facts" in the Watkins Affidavit. According to this statement, the factual issues for which discovery is necessary are:

> 1. the extent to which Associates' network of participating physicians has penetrated the market;
>
> 2. the market share of Two Rivers Radiology P.C.; and
>
> 3. the nature and purpose of the arrangements and connections linking defendants with Two Rivers and possibly other co-conspirators.

Watkins Affidavit, at par. 5.

We find that the issues proposed are relevant to the question of the impact of defendants' actions on competitive conditions, and that they could create genuine issues of material fact if supported by sufficient probative evidence. Thus, this court grants plaintiff's motion for continuance of this action pending discovery related to its section 1 conspiracy claim, limited to the issues identified here. The court will reserve its decision on plaintiff's state claims pending its final determination on summary judgment.

C. *Sanctions*

Given the fact that this court has denied defendants' summary judgment motion as to plaintiff's section 1 conspiracy claim pending discovery, it is inappropriate to grant the defendants' motion for sanctions against the plaintiff and its counsel. Rule 11 sanctions are to be imposed against an attorney and/or his client "when it appears that a pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Eastway Construction Corp. v. City*

of New York, 762 F.2d 243, 252 (2d Cir.1985), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).[5]

[16] As underscored by the U.S. Court of Appeals for the Second Circuit in *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987), and by the Notes of the Advisory Committee on Rules referable to the 1983 amendments to Rule 11, the application of Rule 11 is limited to testing the conduct of the signer of a pleading, motion, or other paper as of the time it was signed. Rule 11 does not impose a continuing duty to correct or withdraw an earlier pleading, motion or other paper. *Oliveri*, 803 F.2d at 1274; *see also, Motown Productions, Inc. v. Cacomm, Inc.*, 849 F.2d 781, 784-85 (2d Cir., 1988). Furthermore, the Second Circuit has stated that Rule 11 is violated only when it is " 'patently clear that a claim has absolutely no chance of success.' " *Oliveri*, 803 F.2d at 1275, quoting *Eastway Construction Corp. v. City of New York*, 762 F.2d at 254 (2d Cir.1985).

[17, 18] In addition, where the action involves antitrust claims, caution in the imposition of Rule 11 sanctions is especially appropriate given the importance of discovery in antitrust cases where evidence is largely within the knowledge and control of adverse parties. Acknowledging this principle, the court in

---

[5] Rule 11 provides, in pertinent part, that:

> "The signature of an attorney or party constitutes a certificate by him that he had read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction...."

Fed.R.Civ.P. 11.

Mohammed v. Union Carbide Corporation, 606 F.Supp. 252 (E.D.Mich.1985) concluded that no award of Rule 11 sanctions was warranted in connection with the plaintiff's claims that the defendants had violated Sections 1 and 2 of the Sherman Act. "The difficulty of investigating the conspiracy and monopolization claims prior to the initiation of the lawsuit lessens the extent of investigative efforts that an attorney must undertake to satisfy the 'reasonable inquiry' standard." *Mohammed*, 606 F.Supp. at 262. In this case, the plaintiff's claims that defendants violated Section 1 of the Sherman Act are as complete as they can be without the aid of discovery. Reference to plaintiff's affidavit outlining the actions of its attorney to make a reasonable inquiry that his client's claims are well grounded in fact and law are adequate, at least at this stage of the proceedings. Given the findings of the *Mohammed* court, relative to antitrust actions, it appears that plaintiff's attorney has made a sufficient inquiry to satisfy the 'reasonable inquiry' standard. Thus, this court denies defendants' motion for Rule 11 sanctions.

Accordingly:

(1) Defendants' motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) is denied as to plaintiff's Section 1 Sherman Act claim and granted as to plaintiff's Section 2 Sherman Act claim; and

(2) Defendants' motion for summary judgment as to plaintiff's Section 1 Sherman Act claim is denied, without prejudice to renew pending completion of discovery as set forth herein.

IT IS SO ORDERED.

CAPITAL IMAGING ASSOCIATES, P.C., Plaintiff,

v.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., and Mohawk Valley Physicians' Health Plan, Inc., Defendants.

No. 88-CV-1291.

United States District Court,
N.D. New York.

May 8, 1992.

Private radiology practice sought to recover treble damages for and obtain relief from alleged violations of Sherman Act by health maintenance organization (HMO) and independent practice association of member physicians organized to provide medical care to HMO's enrollees. Defendants filed motion for summary judgment, and plaintiff cross-moved to amend its complaint. The District Court, McCurn, Chief Judge, held that: (1) plaintiff failed to present any evidence to support finding that defendants' exclusion of plaintiff from membership in independent practice association constituted conspiracy in violation of Act; (2) plaintiff failed to demonstrate that purpose or effect of alleged conspiracy constituted unreasonable restraint of trade which injured plaintiff; and (3) upon dismissal of federal cause of action, Court would decline to exercise pendent or supplement jurisdiction over related state claims.

Motion for summary judgment granted; motion to amend denied; state claims dismissed.

Cooper Erving Savage Nolan & Heller (Mark E. Watkins, of counsel), Albany, N.Y., for plaintiff.

Epstein Becker & Green (Linda V. Tiano, of counsel), New York City, Clifford E. Barnes, Washington, D.C., for defendants.

MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

I. INTRODUCTION

Plaintiff invokes this court's jurisdiction pursuant to the provisions of sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to recover treble damages for and obtain injunctive relief from defendants' alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and the costs of this suit including reasonable attorney's fees. In response to plaintiff's allegations, defendants moved in 1989 to dismiss plaintiff's complaint or, in the alternative, for summary judgment. In a Memorandum-Decision and Order ("order") dated November 28, 1989, defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) was granted as to plaintiff's section 2 Sherman Act claim but denied as to plaintiff's section 1 Sherman Act claim. *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 725 F.Supp. 669, 681 (N.D.N.Y.1989). Although the court denied defendants' motion for summary judgment as to plaintiff's section 1 claim, it did so without prejudice and with leave to renew pending completion of discovery limited to those factual issues set forth in the order. *Id.* Now that discovery has been completed, defendants renew their motion for summary judgment. Plaintiff opposes this motion and in addition cross-moves to amend its complaint to more specifically identify the relevant market. It is these motions which are presently before the court.

II. BACKGROUND[1]

A. The Parties

At the time plaintiff ("Capital") commenced this action, it was one of only two private radiology practices offering a full range of diagnostic imaging services in the area around Albany,

---

[1] The court assumes familiarity with the facts set forth in its previous order dated November 28, 1989, *Capital Imaging*, 725 F.Supp. 669, and summarizes only those necessary to the consideration of the motions now before the court.

New York, inclulding parts of southern Vermont and western Massachusetts. Capital's only competitor was Two Rivers Radiology ("Two Rivers"), a private radiology practice with offices located across the street from Capital in Latham, a community in northern Albany County, New York. Although Two Rivers is not a party to this action, plaintiff contends that the contract between Two Rivers and defendants to provide a specialized radiological procedure known as Magnetic Resonance Imaging ("MRI") is evidence that defendants acted together for the anticompetitive purpose of harming the market for radiology referrals. *See* Plaintiff's Memorandum of Law at 4.

Defendant, Mohawk Valley Medical Associates ("Associates"), is an independent practice association ("IPA") of member physicians organized to provide medical care to enrollees of defendant, Mohawk Valley Physicians Health Plan, Inc. ("MVP"). Together the defendants constitute an example of an IPA-model health maintenance organization ("HMO"). Under this type of arrangement, the HMO (MVP) contracts with an organization of physicians (Associates) to provide physician services to the HMO's members in the individual physicians' offices.

In order for an entity, such as MVP, to operate as an HMO, it must apply to the New York State Department of Health ("Department") for a certificate of authority. N.Y.Pub. Health Law § 4402(1) (McKinney 1985). As part of the certification process, the Department approves the service area within which the HMO can provide its approved benefits package. N.Y.Comp.Codes R. & Regs. tit. 10, § 98.7. If subsequently an HMO wants to expand its service area, it must apply for and receive an amended certificate of authority. N.Y.Comp.Code R. & Regs. tit. 10 § 98-7(b). At the time this suit was commenced, MVP was certified to provide comprehensive health services in the counties of Schenectady, Saratoga, Montgomery, Fulton, Herkimer, Oneida, Madison, Dutchess, Clinton, Essex, Franklin, St. Lawrence, and Otsego. More recently, MVP has received an amended certificate of authority which extends its service area to include the counties of Delaware, Ulster, Warren and Rensselaer. *See* Defendants' Memorandum of Law at 6 n. 1. MVP has never been certified to provide its services in Albany County.

The Department also regulates the operation of Associates. In accordance with New York State law, an IPA is organized to contract with physicians and other providers of medical or medically-related services in order to contract with a single HMO to make such provider services available to that HMO and its enrollees. N.Y.Comp. Codes R. & Regs. tit. 10, § 98.-4(b)(6)(iv). In this case, Associates has contracted with MVP to provide physician services in a specified service area which includes the counties of Schenectady, Fulton, Montgomery and Saratoga. Pursuant to state law, Associates and MVP have entered into an agreement whereby Associates has agreed, *inter alia*, to (1) arrange for the provision of physician and other health professional services at such times and in such locations as MVP may require to satisfy the needs of its members; (2) establish credentialling requirements for membership in Associates; (3) maintain contracts with a sufficient number of physicians to guarantee its ability to deliver health services; and (4) arrange for member accessibility to all health services in the service area. N.Y.Comp.Codes R. & Regs. tit. 10, § 98.2(aa).

B. The Complaint

In its complaint, Capital alleges that from a date at least as early as September 16, 1986, and continuing to the present, the defendants, Two Rivers, and other unnamed co-conspirators have engaged in an unlawful combination or conspiracy in unreasonable restraint of interstate commerce in violation of section 1 of the Sherman Act ("section 1"). According to Capital, this alleged conspiracy consists of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to exclude Capital from membership in Associates, thereby unlawfully restricting Capital's access to the market for radiological services controlled by defendants.

This action arises as a result of defendants' exclusion of Capital from their health insurance plan. Capital applied for, but was denied, membership in the Associates. The reason given for this denial was that Capital's only office was in Albany County, outisde MVP's designated service area. Capital contends that this reason is inconsistent with MVP's description of its service

area in its promotional materials and with MVP's treatment of other physicians with offices in Latham, New York. In addition, Capital contends that Associates' refusal to allow it to participate in defendants' provider network, among other things, effectively denies Capital the ability to compete for radiology referrals from Associates' participating physicians. Finally, Capital contends that this inability to compete for radiology referrals denies Associates' participating primary care physicians and specialists the ability to choose among radiologists on the basis of quality and service.

C. Prior Proceedings

In its previous order, this court denied defendants' motion to dismiss Capital's section 1 claim because "[p]laintiff has *alleged* a restraint on trade sufficient to defeat the motion to dismiss." *Capital Imaging*, 725 F.Supp. at 679 (emphasis in original).[2] Nonetheless, the court went on to say that "[p]laintiff has failed, at this stage, to come forth with any proof of the impact of defendants' actions on competitive conditions sufficient to defeat a motion for summary judgment." *Id.* Rather than grant defendants' motion for summary judgment with respect to plaintiff's section 1 claim at that time, however, the court granted Capital's cross-motion to continue this action pending discovery pursuant to Fed.R.Civ.P. 56(f).

[1] In order to be granted relief pursuant to Fed.R.Civ.P. 56(f), plaintiff must by affidavit (1) identify the specific controverted facts which are the basis of the discovery request; and (2) show that such controverted facts could create a genuine issue of material fact sufficient to defeat the defendants' motion for summary judgment. *Capital Imaging*, 725 F.Supp. at 680 (citing *Paul Kadair Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1028 (5th Cir. 1983)). In compliance with Rule 56(f), Capital identified its "controverted facts" in the Watkins Affidavit. According to this affidavit, the factual issues which required discovery were:

---

[2] In this same order, the court granted defendants' motion to dismiss Capital's section 2 Sherman Act claim pursuant to Fed.R.Civ.P. 12(b)(6). In addition, the court reserved decision on Capital's state claims pending its final determination on summary judgment.

1. the extent to which Associates' network of participating physicians has penetrated the market;

2. the market share of Two Rivers Radiology P.C.; and

3. the nature and purpose of the arrangements and connections linking defendants with Two Rivers and possibly other co-conspirators.

Capital Imaging, 725 F.Supp. at 680 (quoting Watkins Affidavit at ¶ 5).

Based on this affidavit, the court found that the "issues proposed are relevant to the question of the impact of defendants' actions on competitive conditions, and that they could create genuine issues of material fact if supported by sufficient probative evidence." *Id.* Therefore, the court granted plaintiff's cross-motion for "continuance of this action pending discovery related to its section 1 conspiracy claim, *limited to the issues identified here.*" *Id.* (emphasis added). Now that discovery has been completed, defendants renew their motion for summary judgment pursuant to Fed. R.Civ.P. 56.

III. DISCUSSION

A. Summary Judgment Standard

[2] Summary judgment is appropriatre where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 210-12 (1986). The mere existence of some alleged factual dispute, however, will not defeat such a motion. *Id.* To the contrary, Federal Rule of Civil Procedure 56 requires that there be no *genuine* issue of *material* fact. *Id.* at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211 (emphasis in the original). Material facts are defined as those which might affect the outcome of the suit under the governing law. *Id.* In addition, Federal Rule of Civil Procedure 56 limits the information that the court may consider

in determining whether or not to grant summary judgment to the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file. *See* Fed.R.Civ.P. 56. In this regard, the movant's uncontested assertions in its 10(j) Statement are deemed admitted for purposes of deciding whether summary judgment is appropriate. *See* Local Rule 10(j); *see also Blackwelder v. Safnauer*, 866 F.2d 548 (2d Cir.1989).

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2558, 91 L.Ed.2d 265, 273 (1986). The moving party may discharge this burden by demonstrating to the court that there is no evidence to support the non-movant's case on which that party bears the burden of proof at trial. *Greenblatt v. Prescription Plan Servs. Corp.*, 783 F.Supp. 814, 819 (S.D.N.Y.1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

[3] Once the moving party has met its burden, the burden shifts to the non-moving party to demonstrate that there is a genuine issue of material fact. In this regard, the non-movant must do more "that simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). "Speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. To avoid summary judgment, enough evidence must favor the non-moving party's case such that a jury could return a verdict in its favor." *Greenblatt*, at 819-820 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (interpreting the "genuineness" requirement)). Moreover, as a preliminary matter, the non-movant must "make a showing sufficient to establish the existence of [the] element[s] essential to [its] case, and on which [it] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552, 91 L.Ed.2d at 273. If the non-movant fails to satisfy this

initial burden, there can be no genuine issue as to any material fact because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* Under these circumstances, the moving party is entitled to a judgment as a matter of law. *Id.* at 323, 106 S.Ct. at 2552, 91 L.Ed.2d at 273.

More specifically, in the context of a Sherman Act claim, the Supreme Court has held that to survive a motion for summary judgment, the non-movant must establish that there is "a genuine issue of material fact as to whether [defendants/movants] entered into an illegal conspiracy that caused [plaintiff/non-movant] to suffer a cognizable injury." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, 551-52 (1986). The Court went on to say that, in this regard, plaintiff must show more than a conspiracy in violation of the antitrust laws. It must show injury to it resulting from the defendants' illegal conduct. *Id.* In addition, the Court in *Matsushita* held that in a section 1 case antitrust law limits the range of permissible inferences which can be made from ambiguous evidence. *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1356, 89 L.Ed.2d at 553. With respect to this point, the Court cited its decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), in which it held that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an antitrust conspiracy." *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1356, 89 L.Ed.2d at 553 (quoting *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1470, 79 L.Ed.2d at 785). Finally, the Court held that to survive a motion for summary judgment, the non-movant must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *Id.* (quoting *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471, 79 L.Ed.2d at 785).

B. Sherman Act Section 1 Claim

[4] There are two elements which are essential to a section 1 claim. First, plaintiff must demonstrate that there is a "contract, combination or conspiracy." Secondly, plaintiff must demonstrate that defendants' actions constitute an unreasonable

restraint of trade. *Capital Imaging*, 725 F.Supp. at 676 (citing *Jim Forno's Continental Motors, Inc. v. Subaru Distribs. Corp.*, 649 F.Supp. 746 (N.D.N.Y.1986)). It is with these elements in mind that the court must determine whether or not Capital's discovery has unearthed evidence sufficient to withstand defendants' motion for summary judgment.

1. "Contract, Combination or Conspiracy"

In their original motion papers, defendants conceded that Capital had sufficiently alleged a "contract, combination or conspiracy under the meaning of Section 1," to withstand a motion to dismiss. *See Capital Imaging*, 725 F.Supp. at 676. They now contend, however, that Capital has failed to come forth with evidence that a conspiracy exists sufficient to withstand a motion for summary judgment. *See* Defendants' Memorandum of Law at 21. To the contrary, Capital contends that it "has demonstrated sufficient direct factual and circumstantial evidence that MVP and [Associates] conspired to deny Capital membership in [Associates] for an anticompetitive purpose, namely to preserve for [Associates] radiologists sole access to referrals from primary physicians and other specialists doing business in Fulton, Montgomery, Saratoga, Rensselaer, and Schenectady Counties." *See* Plaintiff's Memorandum of Law at 1.

[5, 6] Every contract between a buyer and a seller of services has the effect of which plaintiff complains. It is axiomatic that when a buyer contracts with one seller, a second seller no longer has access to the buyer's business to the extent that it is covered by the existing contract. *See Barry v. Blue Cross of California*, 805 F.2d 866, 871 (9th Cir.1986). Nevertheless, such a consequence is not unlawful. *Id.* As was the case with the plaintiff in *Barry*, Capital seems to have confused an agreement to boycott which is illegal with an agreement to buy and sell services which is legal. *See id.* Moreover, given the industry within which both plaintiff and defendants operate, Capital's contention that a conspiracy exists for purposes of section 1 liability simply because defendants have contracted with some radiologists and not with others, including Capital, is not legally

supportable.[3] One of the essential features of an HMO is that it selects preferred physicians and excludes others. In fact, as this court previously stated, this practice creates, rather than stifles, competition among the providers of health care services. *Capital Imaging*, 725 F.Supp. at 673.[4] Thus, if this court were to accept Capital's statement as proof of a conspiracy, all HMOs would be illegal as per se violations of the antitrust laws. This simply is not the law.

[7] In response to Capital's allegations of conspiracy, defendants offer two permissible business reasons for denying Capital's request for membership in the Associates, both of which arise from the Associates' Membership Procedures. *See Capital Imaging*, 725 F.Supp. at 674. First of all, defendants argue that Capital's office is outside defendants' service area and therefore does not meet the requirement that members have an office in the MVP service area. *Id.* Secondly, defendants contend that there is no deficiency of radiology services within their service area that would require them to seek outside providers. Although plaintiff claims that defendants' first reason for its exclusion is a sham, it is undisputed that, in fact, this is a membership requirement and Capital's office is in Albany County, outside of defendants' service area. Likewise, defendants' second contention is supported by statistics which plaintiff itself has provided. For example, plaintiff states that 15 of 17 radiologists in Schenectady County and 15 of 20 radiologists in Rensselaer County are members of the Associates. *See* Plaintiff's Memorandum of Law at 18 (citing Berlow Affidavit at ¶¶ 8, 9 and Fitzgerald Affidavit at ¶ 17). These figures, at least with respect to these two counties within MVP's service area, strongly support defendants' contention that there is no deficiency

---

[3] Interestingly enough, Capital has not presented this court with any evidence that any radiologist who meets the Associates' membership requirements has been denied membership or that, in the alternative, any radiologist who, like Capital, does not meet these requirements has been admitted. Even Two Rivers which plaintiff contends is a co-conspirator with defendants has not been admitted to membership in the Associates.

[4] Antitrust enforcement agencies also consider exclusions of physicians from HMOs to be procompetitive. *See Capital Imaging*, 725 F.Supp. at 673 n. 4.

of radiology services in MVP's service area and thus no need to extend membership in the Associates to a group of radiologists located outside this service area.

The only concrete example to which plaintiff points as evidence of a conspiracy to exclude Capital from membership in the Associates involves "the circumstances under which Two Rivers Radiology P.C. ("Two Rivers") was awarded an exclusive contract to provide Magnetic Resonance Imaging ("MRI") services to enrollees of MVP..."[5] *See* Plaintiff's Memorandum of Law at 1. Plaintiff alleges that the bidding process for this contract was rigged and that defendants had decided prior to soliciting the bids that it would contract with Two Rivers. As evidence of this statement, plaintiff points to the September 21, 1987, minutes of the Board meeting which state that "Mohawk Valley Physicians' Health Plan will contract with Upstate Imaging [Two Rivers] for MRI scans..." *See* Exhibit F to Plaintiff's 10(j) Statement. Defendants counter this argument by submitting the minutes of the Board meeting of October 19, 1987, which corrected this statement to read "MVP Health Plan will request bids from Upstate Imaging and Capital Imaging for MRI scans." *See* Exhibit 14 to Defendants' 10(j) Statement.

Although for purposes of this motion it is not this court's function to rule on the weight of the evidence or the issue of credibility, *Anderson v. Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2511, 91 L.Ed.2d at 212, it is its function to determine which facts are material. In this regard, the court fails to see how the bidding process for the MRI contract, even if rigged, is any indication that defendants conspired to exclude Capital from

[5] Although initially it appeared that at least one basis for plaintiff's section 1 claim was the defendants' exclusive contract with Two Rivers for MRI services, Capital now states that it does not allege that the MRI arrangement between defendants and Two Rivers was an antitrust violation or that it sustained antitrust damages because of it. Rather, plaintiff contends that this arrangement is simply evidence of the purposeful anticompetitive scheme to exclude Capital from membership in the Associates. *See* Plaintiff's Memorandum of Law at 6.

membership in the Associates. This is especially true in light of the fact that Capital concedes that the MRI contract itself is not an antitrust violation. Moreover, Two Rivers is not a member of the Associates nor does Two Rivers provide any other radiology services to defendants' enrollees.[6] Accordingly, looking at the totality of the situation, the court concludes that Capital has failed to present this court with any evidence to support a finding that defendants' exclusion of Capital from membership in the Associates in any way constituted a conspiracy in violation of section 1.

2. Restraint of Trade

[8] Even if the court had concluded that defendants illegally conspired to exclude Capital from membership, Capital still must demonstrate that the purpose or effect of this alleged conspiracy constitutes an unreasonable restraint of trade which has injured plaintiff within the meaning of section 1. *See Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133 (2d Cir.1978), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981). Although on its face section 1 prohibits every restraint of trade, courts have interpreted this provision to prohibit only those combinations that unreasonably restrain competition. *Capital Imaging*, 725 F.Supp. at 677 (citing *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1283 (7th Cir.1983); *Jim Forno's Continental Motors, Inc. v. Subaru Distribs. Corp.*, 649 F.Supp. 746, 753 (N.D.N.Y.1986)). Although some types of conduct are considered per se unreasonable, this court previously held that "defendants' type of exclusivity practices are vertical, nonprice restraints that [must be] analyzed not under the *per se* rule, but under the 'rule of reason' standard." *Id.* (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58–59, 97 S.Ct. 2549, 2561–62, 53 L.Ed.2d 568, 585–86 (1977); *Ralph C. Wilson Indus. v. Chronicle Broadcasting*, 794 F.2d 1359, 1363 (9th

---

[6] It is also interesting to note that Two Rivers' bid for MRI services was $510 while Capital's was $550.

Cir.1986)). The court adheres to this conclusion despite plaintiff's arguments to the contrary. *See Barry v. Blue Cross of California*, 805 F.2d 866 (9th Cir.1986); *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (holding that under certain circumstances the court should analyze even a horizontal restraint using the rule of reason test).

[9, 10] Under this rule of reason standard, plaintiff must demonstrate more than that it was harmed in its capacity as a competitor. *See id.* What is significant is "injury to the market, not to individual firms..." *Id.* at 677 (quoting *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983)). In this regard, the rule of reason inquiry focuses directly on the challenged restraint's impact on competitive conditions. *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637, 648 (1978). Accordingly, as this court has previously held, to adequately allege a restraint of trade under the rule of reason, plaintiff "must *at least* suggest the size of the relevant product and geographic markets, the amount of competition foreclosed, and how the acts of the defendants affected that competition." *Id.* (emphasis added) (quoting *Jim Forno's Continental Motors, Inc. v. Subaru Distribs. Corp.*, 649 F.Supp. 746, 754 (N.D.N.Y.1986)). The court will discuss each of these elements on which plaintiff bears the burden of proof *seriatim*.

a. The Relevant Antitrust Market

In its original complaint, Capital identified its geographic and product markets as the sale and use of diagnostic imaging equipment in the United States. *See* Plaintiff's Complaint at ¶ 7. In its original Rule 10(j) Statement, however, plaintiff refined its definition of the relevant market to be "the market for referrals to private diagnostic radiology centers offering a complete range of diagnostic imaging technology in an area within a radius of at least 100 miles from Albany, New York." *See Capital Imaging*, 725 F.Supp. at 677. Now that discovery has been completed, plaintiff cross-moves to amend paragraph 7 of its complaint to further narrow its definition of the relevant market

as follows: "[t]he relevant market for purposes of this action is the market for radiology referrals within a radius of 100 miles from Albany, New York." *See* Plaintiff's Memorandum of Law at 20.

[11, 12] There are two distinct, but related, components that comprise an anti-trust market: (1) the relevant product market and (2) the relevant geographic market. *Drs. Steuer & Latham, P.A. v. National Medical Enters., Inc.*, 672 F.Supp. 1489, 1510 (D.S.C.1987). The relevant product market consists of those reasonably interchangeable services or products that compete with the products or services at issue. *Id.* The relevant geographic market consists of the geographic area in which there is effective competition in the sale and distribution of the particular services or products and in which persons or entities actually, or potentially may, compete. *Id.* In the present case, Capital defines the product market as "radiology referrals" and the geographic market as "the area within a 100 mile radius of Albany, New York." Defendants do not oppose Capitals' definition of the relevant market. Absent any proof to the contrary, the court concludes that plaintiff's proposed definition of the relevant market is appropriate, at least for purposes of these motions. Accordingly, the court concludes that Capital has met its burden to suggest the size of the relevant antitrust market. The court, therefore, adopts this definition as a basis for determining whether defendants' actions constitute a restraint of trade.

b. Effect on Competition

[13-16] Under the rule of reason, plaintiff must demonstrate that defendants' alleged improper behavior has either an anti-competitive purpose or an anticompetitive effect which restrains trade in the relevant market. *See Apex Oil Co. v. DiMauro*, 713 F.Supp. 587, 595 (S.D.N.Y.1989). This is often difficult because the antitrust laws are concerned only with acts that harm "competition, not competitors." *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 97 S.Ct. 690, 698, 50 L.Ed.2d 701, 712 (1977)). In other words, behavior that hurts or even destroys an individual competitor is not illegal under the Sherman Act unless it also adversely affects competition.

See id. Thus, if plaintiff fails to prove anticompetitive purpose or effect, its complaint will fail as a matter of law to state a cause of action under the antitrust laws. *See id.* (citing *United States Football League v. National Football League*, 842 F.2d 1335, 1360 (2d Cir.1988)). If, however, plaintiff meets this initial burden, the burden then will shift to defendants either to justify their acts or to demonstrate a procompetitive result of their challenged behavior. *Apex Oil Co.*, 713 F.Supp. at 595 (citing *NCAA v. Board of Regents*, 468 U.S. 85, 113, 104 S.Ct. 2948, 2966, 82 L.Ed.2d 70, 91 (1984)).

[17] In order to establish that defendants' actions have an impermissible effect on competition, Capital, as a preliminary matter, must demonstrate that defendants have significant market power in the relevant market. *See Hassan v. Independent Practice Assocs., P.C.*, 698 F.Supp. 679 (E.D.Mich.1988). This is so because "[m]arket power means the ability to injure consumers by curtailing output and raising price; no possible injury, no market power; no market power, no violation; injury to consumers is therefore an essential ingredient of liability." *Drs. Steuer & Latham*, 672 F.Supp. at 1504 (quoting *Fishman v. Estate of Wirtz*, 807 F.2d 520, 568 (7th Cir.1986) (Estabrook, J. dissenting in part)).

[18] The court has reviewed all the evidence which Capital has submitted in support of its argument that defendants have substantial market power in the "market for radiology referrals within a radius of 100 miles from Albany, New York." In this regard, plaintiff offers the following statistics:

> (1) *75–80% of the primary care physicians* in *Schenectady County* are members of the Associates
>
> (2) *64% of all physicians in Schenectady County* are members of the Associates
>
> (3) *69% of all physicians in Montgomery County* are members of the Associates
>
> (4) *82% of all physicians in Saratoga County* are members of the Associates

(5) *15 of 17 radiologists in Schenectady County* are members of the Associates

(6) *15 of 20 radiologists in Rensselaer County* are members of the Associates

(7) 6 physicians who are Associates' members made the largest number of referrals to Two Rivers from Schenectady County – more than 50 procedures each in 1990

See Plaintiff's Memorandum of Law at 17–18; Fitzgerald Affidavit at ¶5.

At first glance these statistics would appear to support plaintiff's contention that defendants have significant market power. However, on closer examination it becomes evident that these figures account for only a very small percentage of the consumers[7] and the services at issue in the relevant antitrust market. In an attempt to put Capital's figures into perspective, defendants point out that:

(1) they enroll *100,500 members* in the relevant geographic area which contains *54 HMOs* with *4,196,806 enrollees*

– thus defendants have only *2.3% of the HMO enrollees* within 100 mile radius of Albany

– in addition these 100,500 members compose only *1.15% of the total population* of the counties within 100 mile radius of Albany

(2) they contract with *1,410 physicians* which is *6.75% of the 20,880 licensed physicians* in the counties within 100 miles of Albany

See Defendants' Reply Memorandum of Law at 25.

---

[7] This is true whether "consumer" is defined as the HMO's enrollees or as the primary care physicians within a 100 mile radius of Albany, N.Y. who make radiology referrals.

Capital does not contest the accuracy of defendants' figures. Rather, Capital attempts to avoid the issue of market power by stating that, at this time, it does not have to establish a uniform concentration of defendants' activities at each location within the 100 mile radius nor does it have to establish the exact contours of the market at this time. *See* Plaintiff's Reply Memorandum at 4. In support of this position, plaintiff cites *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1573–74 (11th Cir.1991), for the proposition that "[t]he parameters of a given market are questions of fact, and therefore summary judgment is inappropriate if there are material differences of fact..." However, *Thompson* is not dispositive of the present case. In *Thompson*, the parties disagreed about the appropriate boundaries of the relevant market. It was this dispute which in the court's mind created the material questions of fact that made summary judgment inappropriate. To the contrary, in this case, the parties do not dispute the contours of the relevant market. In fact, quite the opposite is true. Defendants appear ready to concede to any definition of the relevant market that plaintiff asserts. Under these circumstances, the court concludes that there are no material issues of fact concerning the relevant market which would make summary judgment inappropriate.

[19,20] Furthermore, the issue here is not the relevant market but rather the effect of defendants' actions on competition in this market. Although this does not necessarily require that plaintiff perform a detailed market analysis, failure to do so may be fatal to a section 1 claim unless there is proof of "actual detrimental effects, such as a reduction of output [or an increase in prices which could] obviate the need...[for such] elaborate market analysis." *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1448 (9th Cir.1988) (quoting *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 460–61, 106 S.Ct. 2009, 2018–19, 90 L.Ed.2d 445, 457–58 (1986)). Capital has come forward with no proof that defendants have the ability to increase prices or decrease output in this market – either of which would constitute actual detrimental effects sufficient to demonstrate that defendants possess market power. Accordingly, the court concludes that Capital has failed to meet its burden

with respect to this essential element of its claim that defendants' actions constitute an unreasonable restraint of trade.

c. Amount of Competition Foreclosed

[21] With regard to this last element, Capital has presented no clear evidence of the degree of competition it claims has been foreclosed by defendants' actions. However, the court has been able to reach a conclusion on this issue based on the uncontroverted statistics provided by defendants. Even using plaintiff's definition of "consumer" as those primary care physicians within a 100 mile radius of Albany, New York who make radiology referrals, the fact remains that defendants contract with less than 6.75% of these physicians.[8] In addition, none of these physicians are precluded by their contracts with defendants from referring their non-HMO patients to Capital. The fact that they may choose not to, as plaintiff alleges, cannot be traced to defendants' actions. Thus, absent any evidence to the contrary, this court holds that even if it were to conclude that defendants' actions have foreclosed some competition, the effect of this foreclosure would be minimal in nature and would not rise to the level of an unfair restraint of trade. Accordingly, the court concludes that plaintiff has failed to meet its burden with respect to this essential element of its claim that defendants' actions constitute an unreasonable restraint of trade.

C. Absence of Genuine Issues of Material Fact

This court granted plaintiff's motion to continue this action pending discovery limited to three factual issues that Capital contended were relevant to the question of the impact of defendants' actions on competitive conditions in the relevant market. Plaintiff has completed its discovery but has failed to unearth evidence sufficient to establish the existence of the elements essential to its section 1 claim on which it would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552, 91 L.Ed.2d at 273. At most, plaintiff has demonstrated that it has been injured by defendants' actions. Even if this is true,

---

[8] This 6.75% figure is based on the total number of licensed physicians in the relevant geographic market. Obviously, not all of these physicians can be characterized as primary care physicians.

however, injury to a competitor is not antitrust injury. *See Capital Imaging*, 725 F.Supp. at 677.

The court will take a moment to review plaintiff's evidence with respect to each of the factual issues upon which Capital sought discovery. First, although it may be true that Associates' network of participating physicians has significantly penetrated a very small portion of the relevant market, the fact remains that they contract with only 6.75% of the licensed physicians within this same market, compete with 53 other HMOs, and enroll only 2.3% of the HMO enrollees in this area. Secondly, plaintiff has not even attempted to identify Two Rivers' market share. Its single conclusory statement that 6 physicians in Schenectady County who are members of the Associates had the greatest number of referrals to Two Rivers, while it may be relevant, is certainly not dispositive of this issue. Finally, plaintiff alleges that the purpose of the arrangement between defendants and Two Rivers is to limit the radiology referrals to Associates' members, thereby preventing Capital from obtaining such referrals. As stated above, however, this is the normal consequence of any contract between a buyer and a seller and is not unlawful. Moreover, Two Rivers is not a member of the Associates and thus, like Capital, has no access to radiology referrals from the Associates' member physicians. In conclusion, Capital has failed to demonstrate that these facts create any genuine issue of material fact concerning the impact of defendants' actions on competitive conditions in the market for radiology referrals within a 100 mile radius of Albany, New York. Therefore, because plaintiff has failed to establish the existence of either a conspiracy or an unreasonable restraint of trade, essential elements of its section 1 claim, there can be no genuine issues of material fact. Accordingly, the court grants defendants' motion for summary judgment.

D. Plaintiff's State Claims

[22] In addition to its federal cause of action, plaintiff asserts two state causes of action alleging the same activities as violations of section 340 of the New York State General Business Law and the New York State common law against unfair competition.

The court need not spend much time discussing these state claims. The only basis for this court's jurisdiction over such claims is the doctrine of pendent or supplemental jurisdiction. Having dismissed plaintiff's federal cause of action, it is within the court's discretion to decline to exercise its jurisdiction over these state claims. *See Castellano v. Board of Trustees*, 937 F.2d 752, 758 (2d Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 378, 116 L.Ed.2d 329 (1991); *Powell v. Gardner*, 891 F.2d 1039 (2d Cir.1989).[9] Accordingly, the court declines to exercise its supplemental jurisdiction over these state claims and dismisses them.

IV. CONCLUSION

For the reasons stated above, the court concludes that plaintiff has failed to establish that defendants' activities violated Section 1 of the Sherman Act. Accordingly, the court grants defendants' motion for summary judgment. In addition, because the court finds that allowing plaintiff to amend its complaint would be futile, the court denies plaintiff's cross-motion to amend ¶ 7 of its complaint. Finally, the court declines to exercise its jurisdiction over plaintiff's state claims and therefore dismisses them.

IT IS SO ORDERED.

---

[9] Subsequent to the commencement of this action, this principle was codified at 28 U.S.C. section 1367, effective December 1, 1990.

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-391

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CAPITAL IMAGING ASSOCIATES, P.C.,
Petitioner,

v.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., AND
MOHAWK VALLEY PHYSICIANS' HEALTH PLAN, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
CLIFFORD E. BARNES
J. EDWARD NEUGEBAUER
ALEXANDER B. BOUTON

WILLIAM G. KOPIT
Counsel of Record
EPSTEIN BECKER & GREEN, P.C.
1227 25th Street, N.W.
(202) 861-0900
Washington, D.C. 20037
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

WHETHER, for purposes of summary judgment, the Rule of Reason relieves a plaintiff from the requirement of showing a genuine issue of material fact regarding actual anticompetitive effects or market power?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
I. Statement of the Facts	1
II. Proceedings Below	3
A. Opinion of the District Court	3
B. Opinion of the Court of Appeals	4
SUMMARY OF THE ARGUMENT	7
ARGUMENT—REASONS FOR DENYING CERTIORARI	9
I. COURTS HAVE CONSISTENTLY APPLIED THE RULE OF REASON ANALYSIS THAT PLACES THE INITIAL BURDEN ON THE PLAINTIFF TO SHOW THAT THE CHALLENGED CONDUCT PRODUCES ADVERSE EFFECTS ON THE MARKET	9
A. The Challenged Conduct Has Not Caused Any Restraints on Output	11
B. The Challenged Conduct Has Not Caused a Restraint on Prices	15
C. The Challenged Conduct Has Not Caused a Restraint on Quality	16
D. Capital Has Failed To Show That the Health Plan Has Market Power	17
E. The Burden of Proof Shifts to the Health Plan Only After Capital Has Shown Anticompetitive Effects	21

TABLE OF CONTENTS—Continued

Page

II. THE RULE OF REASON IS APPLICABLE TO BOTH HORIZONTAL AND VERTICAL RESTRAINTS 22

III. THE CONDUCT CHALLENGED BY CAPITAL IS NOT A NAKED RESTRAINT 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES — Page

A-Abart Electric Supply, Inc. v. Emerson Electric Co., 956 F.2d 1399 (7th Cir.), *cert. denied*, 113 S. Ct. 194 (1992) 10
Alberta Gas Chemicals, Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988) 13
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 8, 25
Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 25
Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) 22
Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986) .. 18
Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir.), *cert. denied*, 112 S. Ct. 617 (1991) 8, 22, 26
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 25
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 7
Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc. ("Capital I"), 725 F. Supp. 669 (N.D.N.Y. 1989) 2, 3, 4, 14
Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc. ("Capital II"), 791 F. Supp. 956 (N.D.N.Y. 1992) 4, 6, 8, 19
Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537 (2d Cir. 1993) ..... *passim*
Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357 (10th Cir. 1989) 11
City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992) 13
Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992) 12, 13, 16
Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988) 22

TABLE OF AUTHORITIES—Continued

Page

Copy-Data System, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir. 1981) 12, 16

Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802 (6th Cir. 1988) 12, 16

DeLong Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) 17

In re Detroit Automobile Dealers Ass'n, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992) 24

Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992) 8, 13, 17

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 20

FTC v. Superior Court Trial Lawyers Association, 493 U.S. 311 (1990) 7

Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976 (9th Cir. 1988) 12, 16

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) 18

Flegel v. Christian Hospital Northeast-Northwest, 1993-2 Trade Cas. (CCH) ¶ 70,355 (8th Cir. 1993) 10, 22

Futurevision Cable System v. Multivision Cable TV, 789 F. Supp. 760 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993) 23

Hahn v. Oregon Physicians' Services, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) 8, 26

Harron v. United Hospital Center, Inc., 522 F.2d 1133 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) 11

Hassan v. Independent Practice Associates, 698 F. Supp. 679 (E.D. Mich. 1988) 8, 18, 22

Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989) 11, 13

Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987) 11

TABLE OF AUTHORITIES—Continued

Page

International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) 11

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) ..... *passim*

L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414 (11th Cir. 1984) 11

Lie v. St. Joseph Hospital, 964 F.2d 567 (6th Cir. 1992) 22

Miller v. Indiana Hospital, 814 F. Supp. 1254 (W.D. Pa.), *aff'd*, 975 F.2d 1550 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1366 (1993) 24

NCAA v. Board of Regents of the University, 468 U.S. 85 (1984) ..... *passim*

National Bancard Corp. v. VISA, U.S.A., Inc., 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986) 24

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 7

Northwest Medical Laboratories, Inc. v. Blue Cross & Blue Shield, Inc., 794 P.2d 428 (Or. 1990) 8, 14, 25

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 8, 23

Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992) 10, 21, 22

Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988) 10, 24

Palmer v. BRG, Inc., 498 U.S. 46 (1990) 7

Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990) 10

Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987) 12, 16

Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555 (11th Cir. 1991) 11, 12, 16

Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1186 (1988) 11

TABLE OF AUTHORITIES—Continued

Page

Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990) 11

Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884 (1993) 12

Stamatakis Industries v. King, 965 F.2d 469 (7th Cir. 1992) 13

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 18

United States v. Brown University, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3d Cir. 1993) 8, 9, 10, 22

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 17

United States v. Topco Associates, 405 U.S. 596 (1972) 25

U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589 (1st Cir. 1993) 10, 18, 23

Westman Commission Co. v. Hobart International, Inc., 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) 11

STATUTES

Sherman Act

15 U.S.C. § 1 3

15 U.S.C. § 2 3

MISCELLANEOUS

7 Phillip E. Areeda, *Antitrust Law* ¶ 1503 (1986) .. 9

Phillip E. Areeda, *The Rule of Reason—A Catechism on Competition*, 55 Antitrust L.J. 571 (1986) 10

Frank H. Easterbrook, *The Limits of Antitrust*, 63 Texas L. Rev. 11 (1984) 13

Thomas M. Jorde & David J. Teece, *Programs from the 1992 Annual Meeting: The Boundaries of Horizontal Restraints: Communication and Cooperation Among Competitors: Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 Antitrust L.J. 579 (1993) 21

TABLE OF AUTHORITIES—Continued

	Page
Thomas E. Kauper, *The Role of Quality of Health Care Considerations in Antitrust Analysis*, 51 L. & Contemp. Probs. 273 (1988)	16
2 E. Kintner, *Federal Antitrust Law* § 9.2 (1980)	17
William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985)	13
Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991)	13
FTC Staff Advisory Opinion (Mar. 26, 1984)	21
Letter from Jeffrey Zuckerman, Director of the Bureau of Competition, FTC, to David Gates (Nov. 5, 1986)	15
46 Fed. Reg. 48,982 (1981) (FTC Policy Statement on Physician Agreements to Control Medical Prepayment Plans)	15
S. 724-C, 216th Leg. (approved July 28, 1993) (McKinney's Session Laws of New York 1993)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-391

CAPITAL IMAGING ASSOCIATES, P.C.,
Petitioner,

v.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., AND MOHAWK VALLEY PHYSICIANS' HEALTH PLAN, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. Statement of the Facts

Respondent, Mohawk Valley Medical Associates, Inc. ("MVMA"), is an independent practice association ("IPA") of member physicians organized to provide medical care to enrollees of Mohawk Valley Physicians' Health Plan, Inc. ("MVP" or the "Plan"). Joint Appendix ("J.A.") at A-253. MVMA and MVP together constitute a joint venture [1] operating as an IPA-model

[1] It is an uncontroverted fact that MVMA and MVP together constitute a joint venture. Petition at 2.

health maintenance organization ("HMO").[2] *Id.* MVP is licensed as an HMO in the State of New York. J.A. at A-37.

Petitioner, Capital Imaging Associates, P.C. ("Capital"), is a private practice radiology group located in Albany County, New York. Capital offers a full range of diagnostic imaging services (including magnetic resonance imaging ("MRI") services) in an extensive region. J.A. at A-253.

In order for an entity to operate as an HMO in New York, it must apply to the New York State Department of Health for a Certificate of Authority. As part of its regulatory authority, the Department approves the service area within which an HMO can provide services. J.A. at A-258. MVMA and MVP (together referred to as the "Health Plan") have never been certified to provide services in Albany County. J.A. at A-258-59.

MVMA's membership procedures require that in order to be a member of MVMA, a physician must provide medical services in an office within the IPA's service area, and have staff privileges in hospitals participating with MVP. J.A. at A-71.[3] Capital sought membership in the IPA although its offices were located outside the Health Plan's service area. J.A. at A-89. Capital's request was denied by the MVMA, and Capital was informed at that time that the denial of membership was due to not having an office in the service area. J.A. at A-359.

---

[2] "One of the essential features of an HMO is that it selects preferred physicians and excludes others thereby creating competition among the providers of health care services." *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., ("Capital I")*, 725 F. Supp. 669, 673 (N.D.N.Y. 1989).

[3] Physicians who have an office within the service area but who do not have admitting privileges at participating hospitals may, nevertheless, obtain membership if they submit additional information concerning hospital coverage. J.A. at A-71.

MVMA has made exceptions to the requirement that a physician participating in MVMA have an office in the service area when there is a need for the type of additional physicians requesting membership. J.A. at A-27. However, at the time Capital sought membership, there was no need for additional radiologists. J.A. at A-89.

II. Proceedings Below

A. *Opinion of the District Court*

Capital initiated this antitrust action in December of 1988, alleging violations of Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Capital's Section 2 claim was that MVMA and MVP had attempted to monopolize "the sale and use of diagnostic imaging equipment in the *United States*." J.A. at A-11 (emphasis added). The district court dismissed this claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and held that

> [n]ot only is there no *dangerous probability* that defendants will succeed in monopolizing the markets identified by plaintiff [i.e., the United States and the market for referrals to private diagnostic radiology centers in the Albany area], there is no present *possibility* defendants will do so.

Capital I, 725 F. Supp. at 678 (emphasis in original). Capital did not press this claim on appeal.

Capital's alternate theory, under Section 1 of the Sherman Act, was that MVMA and MVP, along with Two Rivers Radiology, P.C. ("Two Rivers"), a group of radiologists in competition with Capital, conspired to exclude Capital from providing services to MVMA and MVP. Although the district court found that Capital had failed to establish any impact on "competitive conditions [resulting from the Health Plan's conduct] sufficient to defeat a motion for summary judgment," the court granted

Capital discovery under Rule 56(f) of the Federal Rules of Civil Procedure. *Id.* at 679.

After over two years of discovery, Capital remained unable to show that the Health Plan's actions constituted an unreasonable restraint of trade. Specifically, the court held that there was no agreement between MVMA and Two Rivers. The court also held that Capital failed to show either actual injury to competition or that the Health Plan had market power sufficient to create an inference of injury to competition. In granting the Health Plan's motion for summary judgment, the district court held that

> Capital has come forward with no proof that defendants have the ability to increase prices or decrease output in the market—either of which would constitute actual detrimental effects sufficient to demonstrate that the defendants possess market power. Accordingly, the court concludes that Capital has failed to meet its burden with respect to this essential element of its claim that defendants' actions constitute an unreasonable restraint of trade.

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., ("Capital II"), 791 F. Supp. 956, 967 (N.D.N.Y. 1992).

B. *Opinion of the Court of Appeals*

Capital appealed the summary judgment of its Section 1 claim, arguing, for the first time, that MVMA, an organization of physicians, was a walking conspiracy. Although the court of appeals determined that Capital had presented sufficient evidence with respect to its new argument that the conduct of the physicians who controlled MVMA constituted a conspiracy, the court nevertheless affirmed the district court's grant of summary judgment.[4] Specifically, the court of appeals held that Capital

---

[4] Capital introduced this new conspiracy claim on appeal. Initially, Capital claimed a conspiracy between MVMA and MVP. For the

had failed to show that the Health Plan's conduct constituted an unreasonable restraint of trade.[5] In so holding, the court of appeals stated that

> Capital's position is simply that it has been harmed as an individual competitor. It has not shown that defendants' activities have had any adverse impact on price, quality, or output of medical services offered to consumers in the relevant market.

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 547 (2d Cir. 1993). The Court elaborated on Capital's failure to meet its burden of showing any adverse impact on competition stating that

> Capital concedes in its brief that whether or not it is admitted into the physicians' association, the fee for radiological services would remain the same. In addition, Capital failed to adduce significant evidence that its exclusion has, in fact, resulted in any decrease in the quality of radiology services to the HMO's patients. Therefore, Capital has not made an adequate showing of detrimental effects to obviate the need to show that appellees possess market power sufficient to stifle competition.

Id. at 546.

Because the court of appeals went on to endorse the district court's conclusion that neither MVMA nor MVP

---

first time on appeal, Capital claimed that "the actions of one of the defendants constituted a conspiracy in and of itself. The actions of the [MVMA] Board in excluding Capital from membership satisfies the requirement of concerted action." Brief of Plaintiff-Appellant at 43. *See* Brief of Defendant-Appellees at 20-22.

[5] Capital continuously cites to the text of the Second Circuit's opinion regarding the evidence of the conspiracy. However, the court of appeals' affirmance of the district court assumed, arguendo, that sufficient evidence of an agreeemnt did exist. Thus, the conspiracy discussion should not be confused with the lack of proof of market power or anticompetitive effects.

possessed market power, it affirmed the district court's judgment. Indeed, the court of appeals correctly determined that MVMA and MVP had a "*de minimis* market share" based upon Capital's own definition of the relevant geographic market—*the area* lying within 100 miles of Albany, New York—and its definition of the relevant product market—radiological services. 996 F.2d at 547 (emphasis in original).

The court of appeals' conclusion that MVA and MVMA lacked the power to injure competition or force consumers to accept higher premiums or lower quality medical care was based upon uncontroverted evidence. *Id.* That evidence reveals that within the geographic market defined by Capital, the Health Plan's enrollees represent 2.3% of HMO enrollees and 1.15% of the total patient population,[6] and that the Health Plan contracted with only 6.75% of the physicians.[7]

Just as it attempts to redefine the geographic market in its current Petition, Capital attempted, on appeal, to avoid the consequences of a devastatingly small market share by arguing (for the first time on appeal) that the relevant geographic market was a new, undefined smaller geographic market within the 100-mile radius of Albany—what Capital now refers to as the 14 counties in which

---

[6] Within the geographic market defined by Capital, there are 54 HMOs with 4,196,806 enrollees. The Health Plan's total enrollment is 100,500.

[7] Capital refers to a percentage of physicians in a limited geographic area which have contracted with MVMA. Capital submitted similar figures to the district court which concluded that "on closer examination it becomes evident that these figures account for only a very small percentage of the consumers and the services at issue in the relevant antitrust market." *Capital II*, 791 F. Supp. at 966. The court concluded that the Health Plan's market data, which was not disputed by Capital, more accurately reflected the relevant market.

BEST AVAILABLE COPY

MVP operates.[8] However, the court of appeals correctly determined that "[t]his new market definition was not presented to the trial court and comes too late for our consideration." *Capital Imaging*, 996 F.2d at 547.

SUMMARY OF THE ARGUMENT

This Court and the lower federal courts have routinely held that a plaintiff in a "rule of reason" case under Section 1 of the Sherman Act must present proof that the defendant possesses market power or has caused anticompetitive effects in the relevant market in order to avoid Summary Judgment. In this case, Capital now asks the Court to grant certiorari in order to change that standard. Capital's request should be denied.

The Circuits agree that the rule of reason analysis is applicable to all conduct except for a limited category of "naked restraints" which are considered *per se* illegal.

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.[9]

---

[8] It should be noted that, throughout this case, Capital has repeatedly attempted to redefine the relevant geographic market which, at the outset, it defined to be the "United States." J.A. at A-11. In the district court, Capital realized its blunder and redefined the relevant geographic market as *the area* lying within a 100-mile radius of Albany, New York. *Capital Imaging*, 996 F.2d at 547. Then, on appeal, Capital once again attempted to further redefine the relevant geographic market as a smaller area lying somewhere within a 100-mile radius of Albany. *Id.*

[9] *See National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (agreements are *per se* illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality"). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723-24 (1988). Such practices include: agreements among competitors to allocate territories to minimize competition, *Palmer v. BRG, Inc.*, 498 U.S. 46, 48 (1990); price-fixing among competitors, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423

NCAA v. Board of Regents of the Univ., 468 U.S. 85, 103-104 (1984).

Courts have uniformly held that HMO activities are governed by the rule of reason rather than the *per se* rule because HMOs plainly increase competition in health care markets. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 339 n.7 (1982); *Northwest Medical Labs., Inc. v. Blue Cross & Blue Shield, Inc.*, 794 P.2d 429 (Or. 1990); *Hahn v. Oregon Physicians' Servs.*, 868 F.2d 1022, 1029 n.5 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679, 688-90 (E.D. Mich. 1988). As the district court correctly observed, HMOs need to exclude physicians in order to achieve their procompetitive goals. *Capital II*, 791 F. Supp. at 963. Indeed, if HMOs were required to accept all physicians, they would not be able to obtain lower physician prices in return for providing the participating physicians increased patient volume.[10] The Second Circuit correctly applied that analysis to the facts of this case.

Under the rule of reason, the initial burden is on the plaintiff to introduce evidence that the challenged conduct causes anticompetitive effects in the marketplace. Then and only then does the burden shift to the defendant to establish a procompetitive justification for the conduct. *See, e.g., United States v. Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3d Cir. 1993); *Bhan*, 929 F.2d

---

(1990); a tying arrangement by a seller with appreciable economic power, *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2079 (1992); and group boycotts by market participants that possess market power or unique access to a business element necessary for effective competition, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

[10] The logical result of Capital's argument that Capital's exclusion from the Health Plan causes anticompetitive effects in the marketplace, is to require an HMO to accept any physician who applies, wherever located.

at 1413; 7 Phillip E. Areeda, *Antitrust Law* ¶ 1502, at 371 (1986).

Capital wants this Court to fashion a new analysis that would turn the rule of reason on its head, by placing the burden on MVMA and MVP to justify their conduct before Capital has introduced any evidence that such conduct could create harm to competition. This new analysis, designed to protect Capital's profits, would not require evidence that competition and consumer welfare be adversely affected. Certiorari should be denied because Capital's injury is not one the antitrust laws were designed to protect.

ARGUMENT—REASONS FOR DENYING CERTIORARI

I. COURTS HAVE CONSISTENTLY APPLIED THE RULE OF REASON ANALYSIS THAT PLACES THE INITIAL BURDEN ON THE PLAINTIFF TO SHOW THAT THE CHALLENGED CONDUCT PRODUCES ADVERSE EFFECTS ON THE MARKET

The Third Circuit recently articulated the analysis consistently used by courts in determining whether a restraint is unreasonable under the rule of reason.[11]

> The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 3034 (1992); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979). The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, *see FTC v. Indiana Federation of Dentists*, 476 U.S.

---

[11] The facts of the *Brown University* case, 1993-2 Trade Cas. (CCH) ¶ 70,358, involve a horizontal conspiracy challenged under Section 1 of the Sherman Act. The Third Circuit concluded that the district court should have applied the rule of reason analysis to the case.

> 447, 460-61, 106 S. Ct. 2009, 2019 (1986), increase in price, or deterioration in quality of goods or services, *see Tunis Bros.*, 952 F.2d at 728. Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct. 7 P. Areeda, *Antitrust Law* ¶ 1503, at 376 (1986). Accordingly, courts typically allow proof of the defendant's "market power" instead. *Tunis Bros.*, 952 F.2d at 727; *see NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 110, 104 S. Ct. 2948, 2965 (1984). Market power, the ability to raise prices above those that would prevail in a competitive market, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46, 104 S. Ct. 1551, 1556 n.46 (1984), is essentially a "surrogate for detrimental effects." *Indiana Dentists*, 476 U.S. at 460-61, 106 S. Ct. at 2019 (quoting 7 P. Areeda, *supra* ¶ 1511, at 429).

Brown University, ¶ 70,358, at 70,889.[12] This analysis is widely accepted by the other circuits,[13] including the Second Circuit which adopted the same standard in this case. *See Capital Imaging*, 996 F.2d at 543.

---

[12] *See also* Phillip E. Areeda, *The Rule of Reason—A Catechism on Competition*, 55 Antitrust L.J. 571, 581-582 (1986).

> [T]he plaintiff must show that the defendant has engaged in a type of activity that can restrain trade significantly. That is, he must show that the challenged restraint is of a kind that can impair consumer welfare, and that the impairment is likely to be significant, by demonstrating either the effects of the restraint or the defendant's market power.

[13] *Flegel v. Christian Hosp. Northeast-Northwest*, 1993-2 Trade Cas. (CCH) ¶ 70,355, at 70,867-68 (8th Cir. 1993); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595-96 (1st Cir. 1993); *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399 (7th Cir.), *cert. denied*, 113 S. Ct. 194 (1992); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 973 (1992); *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988).

A valid Section 1 claim is limited to activities having an adverse impact on the output, quality, or price of goods and services offered to consumers; those activities which have no such effects do not violate Section 1, and should not be restricted. *NCAA*, 468 U.S. at 106-108; *Jefferson Parish*, 466 U.S. at 31 n.52;[14] *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1360 (10th Cir. 1989); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1295-96 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073 (1990); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1186, 1218 (1988).[15] Capital's unsupported assertions and ever-changing arguments about the way in which the Health Plan's conduct has had a negative impact on competition must be rejected.

A. The Challenged Conduct Has Not Caused Any Restraints on Output

Capital has failed to demonstrate that the Health Plan's conduct has had an effect on output in the health care

---

[14] Capital takes exception to the court of appeals' citation of *Jefferson Parish*. However, in this instance, it is not relevant that *Jefferson Parish* involves a vertical restraint because the proposition in *Jefferson Parish* that "[w]ithout a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws . . . ." 466 U.S. at 31 (quoted by the court of appeals, 996 F.2d at 547), is equally applicable to horizontal restraints, such as that alleged in the present case.

[15] Mere competitive advantage or unfair conduct by itself is insufficient to show anticompetitive effect. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991); *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 909 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 421 (11th Cir. 1984); *Harron v. United Hosp. Ctr., Inc.*, 522 F.2d 1133 (4th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976).

financing, radiology services, or referral markets. The mere exclusion of Capital is not, in any way, a reduction in output in the noted markets. Indeed, consumers necessarily limit their "choice" of health service providers by electing to participate in a managed care plan. Consumers unhappy with the provider choices available in one plan may switch to other managed care plans or other types of health care financing. It is the availability of that choice—selecting from among competing health plans—which the antitrust laws are designed to protect. Both the lower federal courts and this Court have unanimously agreed that conduct which affects only the party challenging the conduct is not "unreasonable" under Section 1 of the Sherman Act.[16] As this Court has recently stated

> [t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.

Spectrum Sports, Inc. v. McQuillan, 113 S. Ct. 884, 891-92 (1993).

Capital has established only that it has been precluded from participating in MVMA. While this may adversely

---

[16] "[I]njury to the antitrust plaintiff alone is not sufficient to prove injury to competition." *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 982 (9th Cir. 1988); A simple reshuffling of competitors has no effect on competition. *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992); A mere competitive advantage, by itself, is insufficient to demonstrate anticompetitive effects. *Seagood*, 924 F.2d at 1573; The antitrust laws are not designed to guarantee every competitor tenure in the marketplace. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987); Exclusion of a single supplier is not enough to establish harm to competition. *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 810 (6th Cir. 1988); The antitrust laws were enacted for the protection of competition, not competitors. *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 410 (2d Cir. 1981); Without a showing of actual adverse effect on competition a plaintiff cannot make out a case under the antitrust laws. *Jefferson Parish*, 466 U.S. at 31.

affect Capital, it hardly amounts to a reduction in output. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 652 (10th Cir.), *cert. denied*, 113 S. Ct. 96 (1992). From the perspective of consumers, the only effect is that one radiology supplier has been substituted for another. Yet, the mere reshuffling of suppliers does not violate the antitrust laws.[17] *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992).

Significantly, consumers have numerous choices of health plans. Indeed, approximately 53 HMOs, and numerous other indemnity insurers compete with MVP. If consumers are dissatisfied with a plan, they may simply select another. Unlike purchasers of Kodak copiers who were "locked in" to Kodak parts and services because of heavy capital investment, members of various health plans make no capital investment in those health plans. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112

---

[17] Antitrust actions brought by competitors deserve close scrutiny by the courts. *Indiana Grocery*, 864 F.2d at 1419; *Alberta Gas Chems., Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988). As one commentator has stated "[w]hen a business rival brings suit, it is often safe to infer that the [challenged] arrangement is beneficial to consumers." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Texas L. Rev. 11 (1984). *See also* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991) (Concluding that antitrust suits by competitor plaintiffs are not successful and for good reason); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1479-1480 (1985) (In most cases, the exclusion of a supplier merely substitutes the injured firm's output for that of another or prevents such a substitution with no effect on total output in the market). Thus, Capital's assertion that it has lost business as a result of the challenged conduct "is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other . . . . 'Competition is ruthless, unprincipled, uncharitable, unforgiving—and a boon to society, Adam Smith reminds us, precisely because of these qualities that make it a bane to other producers.'" *Stamatakis Indus. v. King*, 965 F.2d 469, 471 (7th Cir. 1992) (citation omitted).

S. Ct. 2072, 2086 (1992). When consumers are dissatisfied for whatever reason—including price or quality—they can, and do, switch to other health plans during every open season.[18]

Limiting the size of provider panels is an important aspect of managed care plans like MVP.[19] Indeed, "[o]ne of the essential features of an HMO [or other managed care plan] is that it selects preferred physicians [suppliers] and excludes others thereby creating competition among the providers of health care services." *Capital I*, 725 F. Supp. at 673. *See Northwest Medical*, 794 P.2d 428 (discussing the role of the HMO concept in fostering competition in health care financing markets). By contracting with only a limited number of physicians and hospitals, HMOs and other managed care plans actually encourage competition in the physician services market.[20]

Antitrust enforcement agencies also consider the exclusion of providers (i.e., suppliers) from HMOs and other managed care delivery systems to be procompeti-

---

[18] Referral patterns by physicians not attributable to the contractual arrangements or market power of the Health Plan are market imperfections which do not give rise to antitrust liability. *See Jefferson Parish*, 466 U.S. at 26-27. The Court stated that "[w]hile these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of [the conduct alleged to have violated the antitrust law]." *Id.* at 27.

[19] In fact, until recently, New York HMO Law required HMOs to arrange for "out-of-plan" services through a separate insurance company. *See* S. 724-C, 216th Leg. (approved July 28, 1993) (McKinney's Session Laws of New York 1993). Therefore, the "restraint" on consumers alleged by Capital due to the fact that MVP subscribers cannot seek radiology services from non-participating physicians is unrelated to the joint venture entered into by MVP or MVMA.

[20] In contrast to IPA-HMOs that contract with physician organizations (called IPAs), staff model HMOs employ physicians who deliver services in the central facility. Group model HMOs contract with clinics or medical groups. J.A. at A-24.

tive. For example, the Federal Trade Commission ("FTC") has determined that "exclusive arrangements between HMOs and their participating (providers) . . . are likely to benefit consumers by stimulating competition among medical prepayment plans and physicians."[21] Notwithstanding these procompetitive benefits, Capital seeks to challenge an HMO's ability to freely select, or refuse to deal with, physicians, or groups of physicians.

B. The Challenged Conduct Has Not Caused a Restraint on Prices

Capital's exclusion from the IPA has not had and will not have any adverse effect on price. As indicated by the Second Circuit, Capital has admitted that its inclusion in the IPA would not affect the price of radiology services. *Capital Imaging*, 996 F.2d at 546. Indeed, Capital does not claim that its exclusion from the Health Plan in any way impacted price. "Capital has never offered any evidence of increased prices." Petition at 7 n.6.[22]

---

[21] Letter from Jeffrey Zuckerman, Director of the Bureau of Competition, FTC, to David Gates (Nov. 5, 1986). Of course, exclusive contracts may have anticompetitive effects where a large percentage of suppliers are prevented from doing business with competing plans. Where competitors are deprived of an essential source of supply, antitrust violations may be present. However, no such problem exists in this case. As the FTC has stated in its policy statement "[a]ntitrust concern would . . . also arise if a partially integrated plan required its participating [providers] to sign contracts that effectively barred them from participating in any other prepayment plan, and so many [providers] were signed up that it was difficult for other plans to recruit a sufficient . . . panel." FTC Policy Statement on Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48,982, 48,991 (1981). Here, Capital makes no such allegation or claim.

[22] Indeed, at one time, the Health Plan needed radiologists to provide MRI services to Health Plan subscribers and, therefore, accepted bids to provide such services. J.A. at A-249. Capital submitted a bid to provide MRI services at $550 per procedure. However, the Health Plan entered into a contract with Two Rivers to provide MRI services at $510 per procedure. *Id.*

C. The Challenged Conduct Has Not Caused a Restraint on Quality

Capital also has failed to demonstrate any adverse effect on quality of services provided to consumers due to Capital's exclusion from the Health Plan.[23] Indeed, Capital asserts in its Petition "that effects on quality of professional services are [not] capable of precise measurement." Petition at 7 n.6. Thus, as the court of appeals correctly stated, "Capital failed to adduce significant evidence that its exclusion has, in fact, resulted in any decrease in the quality of radiology services to the HMO's patients." *Capital Imaging*, 996 F.2d at 546.[24] J.A. at A-448-49, A-459-60.

---

[23] Capital's unsupported assertions that its services are of "high quality" are self-serving. In an attempt to support its assertions of quality differentials between itself and other radiology practices, Capital misquotes Dr. Meiselman who, in fact, says that *no* quality differences existed. J.A. A-578. Capital then seeks to excuse its failure to support its assertions by quoting a law review article. Petition at 25 (quoting Thomas E. Kauper, *The Role of Quality of Health Care Considerations in Antitrust Analysis*, 51 L. & Contemp. Probs. 273, 276, 294 (1988)). The quote from Kauper, taken in context, says that agreements that result in the lowering of quality are output restrictions only when there is no accompanying decrease in prices, and that this proposition has been recognized in those cases where defendants have sought to avoid liability by claiming their conduct did not lower quality. In our case, the Health Plan has made no such claim. Indeed, it is Capital, not the Health Plan which introduced the issue of quality. Moreover, the quote from Kauper implies that issues of quality are illusory since those who raise them are most often unable to substantiate them.

[24] Indeed, even if Capital's exclusion had, in fact, reduced the quality of radiology services available through MVMA, this reduction of quality is of no consequence in the market as long as consumers have other health plans available. The mere fact that consumers electing MVMA cannot utilize Capital does not establish a reduction of quality in the market. *Jefferson Parish*, 466 U.S. at 31; *Coffey*, 955 F.2d at 1393; *Seagood*, 924 F.2d at 1573; *Crane & Shovel*, 854 F.2d at 810; *Ferguson*, 848 F.2d at 982; *Rutman Wine*, 829 F.2d at 735; *Copy-Data*, 663 F.2d at 410.

D. Capital Has Failed To Show That the Health Plan Has Market Power

Because Capital has not demonstrated any actual adverse effect on competition, the rule of reason requires a demonstration of market power.[25] Consistent with the rule of reason, the Second Circuit supported the district court in concluding that Capital simply failed to establish the existence of market power in the geographic market which Capital, itself, defined.

> Thus, turning to the question of market power, we agree with the district court that Capital has failed to demonstrate that a genuine issue of material fact exists with respect to appellees' strength in the marketplace.

Capital Imaging, 996 F.2d at 547.[26]

The first step in assessing market power is defining the relevant market. *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1507 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). A party's share of the relevant market is indicative of the existence or nonexistence of market power. *Eastman Kodak*, 112 S. Ct. at 2081. The relevant product and geographic market must be defined from the standpoint of consumers. *See NCAA*, 468 U.S. at 112-13; *Jefferson Parish*, 466 U.S.

---

[25] Capital has never challenged the assessment made by the district court that the Health Plan lacked market power in the geographic and product markets defined by Capital.

[26] Failing to establish market power, Capital seeks to minimize the need to do so by, for example, incorrectly quoting an antitrust law treatise. Petition at 21 (quoting 2 E. Kintner, *Federal Antitrust Law* § 9.2 (1980)). While it is true that a § 1 "violation may be established irrespective of whether the participants have power . . . ," this proposition is true, however, only if the case is *per se*. The case cited by Kintner for this proposition is *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which was a *per se* price-fixing case, and in which the Court explicitly stated that "[a] conspiracy to fix prices violates § 1 . . . ." *Id.* at 224 n.59.

at 26-29. "[Y]ou can't pick a market without knowing the purpose of the choice." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting). *See also U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993). The product or service market is composed of products or services that consumers view as reasonably interchangeable. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The geographic market includes the entire area in which consumers could turn if the price of the product or service increased. *Id.* Before the district court, Capital asserted that the relevant geographic market was *the area* within a 100-mile radius from Albany, New York. Capital now seeks to avoid the consequences of its own market definition.

In this case, the relevant product market involves health care financing products offered by HMOs such as the Health Plan. It is only in such markets that consumers can be harmed by higher premiums (prices), or lower quality.[27] Capital admits to the appropriateness of the health care financing market in this case. "Patients consider the prices offered by MVP and its competitors in the health insurance market, not prices in the market for medical services." Petition at 5 (citation omitted). Thus, unless the Health Plan possesses market power in the health care financing market, consumers will simply switch if the Health Plan offers a product with higher prices or lower quality. *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1332-33 (7th Cir. 1986); *Hassan*, 698 F. Supp. at 694-95.

The Health Plan provided the district court with uncontroverted evidence that it did not possess market

---

[27] The Health Plan purchases health services from physicians who are free to contract with other plans or private parties. Participating physicians in MVP are required to refer only MVP subscribers to other specialists participating in the Health Plan. Therefore, MVP and MVMA cannot affect the radiology referral market.

power in the market defined by Capital. Indeed, Capital has attempted to redefine the relevant market several times, but has never been able to establish the existence of market power.[28] Within the market defined by Capital before the district court, the Health Plan's market share is undeniably *"de minimis."* *Capital Imaging*, 996 F.2d at 547.

Capital now refers to the percentage of physicians in each of the five counties in which the IPA services the Health Plan, but this area was never alleged as a geographic market or addressed by the district court. Moreover, the physicians from the five counties who participate in the IPA do not have exclusive contracts with MVMA and are free to service other health plans and private patients.[29] The participation of these physicians in MVMA does not say anything about MVP's market power, or lack of power, in either the health care financing, or HMO market. Thus, Capital's market statistics are not credible evidence

---

[28] Perhaps because of the hopelessness of its cause, Capital's definition of the relevant market has been a continuous moving target. Initially, in the complaint, Capital alleged the relevant market to be "the sale and use of diagnostic imaging equipment in the United States." J.A. at A-11. Subsequenlty, in its statement pursuant to Rule 10(J) of the Local Rules of the Northern District of New York, Capital described the relevant market as the market for referrals to private diagnostic radiology centers offering a complete range of diagnostic imaging technology in an area within a radius of at least 100 miles from Albany, New York. J.A. at A-537. Still later, in opposing Defendants' Motion for Summary Judgment, Capital requested leave of the court to amend its complaint further to define "[t]he relevant market for purposes of this action [as] the market for radiology referrals within a radius of 100 miles from Albany, New York." *Capital II*, 791 F. Supp. at 965; J.A. at A-819 (citing Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Supplemental Appendix ("S.A.") at 94).

[29] The Health Plan cannot be held responsible for the alleged fact that contracting physicians do not use Capital for radiology services for non-Health Plan patients. *Jefferson Parish*, 406 U.S. at 26-27.

of market power, and, in any case, are offered far too late.[30]

Capital's reliance upon the analysis in *NCAA* and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), to assert that evidence of market power is unnecessary, is at best misguided and at worst misleading as applied to this case. In those cases, it was plausible to infer that the anticompetitive effects of the concerted conduct were the proximate result of market power. By contrast, in this case, Capital is not able to offer any plausible theory explaining how the Health Plan possibly could have the market power to maintain prices above competitive levels of profitability, or to reduce quality or output below competitive levels in any relevant market.

> [T]he Court has only condoned dispensing with proof of market power for naked price and output restraints, and thus appears to have been addressing only restraints so pernicious and without redeeming virtues that per se analysis is almost warranted. Second, in each case in which it has declined to require proof of market power, the Court has found specific evidence of anticompetitive effects, *NCAA*, 468 U.S. at 106-108; *Indiana Fed'n of Dentists*, 476 U.S. at 460-61, and held that in such instances, " 'proof of

---

[30] The Second Circuit summarized the market power data supplied by the Health Plan to the district court:

> Capital defined the relevant geographic market as that area lying within a 100-mile radius of Albany, New York. . . . *See Capital II*, 791 F. Supp. at 965. Appellees have accepted these market boundaries and have presented proof that within this 100-mile radius, the Health Plan's 100,500 enrollees represent only 2.3 percent of the region's HMO subscribers and Mohawk Valley's membership includes only 6.75 percent of the region's physicians. Once competition from non-HMO sources within the 100 mile radius is included, the appellees' market share drops even further to merely 1.15 percent of the total insured [sic] patient population. Capital has not contravened the *accuracy* of these figures.

Capital Imaging, 996 F.2d at 547 (emphasis in original).

> actual detrimental effects, such as reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" 476 U.S. at 460-61 (quoting 7 Phillip Areeda, *Antitrust Law* 1511 (1986)). Third, in each case the Court has found that the defendants possessed market power anyway. *Id.* at 460.

Thomas M. Jorde & David J. Teece, *Programs from the 1992 Annual Meeting: The Boundaries of Horizontal Restraints: Communication and Cooperation Among Competitors: Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 Antitrust L.J. 579, 603-604 n.69 (1993).

E. The Burden of Proof Shifts to the Health Plan Only After Capital Has Shown Anticompetitive Effects

Capital attempts to encourage this Court to accept the theory that the Health Plan's alleged failure to offer procompetitive justifications for its conduct defeats summary judgment without regard to Capital's failure to demonstrate anticompetitive effects or market power.[31] That theory and Capital's claims must fail. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 699 (4th Cir. 1991),

---

[31] For instance, Capital states that "[m]arket power comes to the fore only when a procompetitive justification exists." Petition at 19 (citing *FTC Staff Advisory Opinion* (Mar. 26, 1984)). Not only is this assertion a misstatement of the applicable law, but it is squarely and unequivocally contradicted by the very FTC Opinion cited by Capital. The FTC clearly states that its opinion applied the "rule of reason" analysis, and looked to the degree of KPS' market power (25% of the area's population, and 33% (approx.) of area residents with private health insurance). Only after it had found KPS to possess market power did the FTC go on to analyze procompetitive justifications. The FTC stated that

> [b]ecause the proposed restraint may be substantially anticompetitive in some respects [due to KPS' market power], we have attempted under the rule of reason to assess its countervailing justifications.

FTC Staff Advisory Opinion (Mar. 26, 1984), at 4.

cert. denied, 112 S. Ct. 973 (1992). The Health Plan is not required to demonstrate that the challenged conduct promotes a procompetitive purpose, unless the plaintiff meets its initial burden of establishing adequate evidence of market power or actual anticompetitive effects. *Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358, at 70,889.

> [U]nder the rule of reason, [plaintiff] bears the burden of proving the actions of the defendants have unreasonably restrained trade. [*Jefferson Parish*], 466 U.S. at 29. To meet this burden, [plaintiff] must prove what market he contends was restrained and that the defendants played a significant role in the relevant market. Absent this market power, any restraint on trade created by the defendants' actions is unlikely to implicate section 1.

Oksanen, 945 F.2d at 709.

II. THE RULE OF REASON IS APPLICABLE TO BOTH HORIZONTAL AND VERTICAL RESTRAINTS

Courts have been consistent in their application of the rule of reason to both horizontal and vertical restraints.[32] As the First Circuit has stated

> We doubt that the modern Supreme Court would use the boycott label to describe, or the rubric to condemn, a joint venture among competitors in which participation was allowed to some but not all, *compare Northwest Wholesale Stationers, Inc. v. Pacific*

---

[32] *See Hassan*, 698 F. Supp. 679 (The court analyzed the joint venture aspects of an IPA arrangement and concluded that the rule of reason was applicable although there were horizontal aspects to the IPA). *See also Flegel*, 1993-2 Trade Cas. (CCH) ¶ 70,355 (8th Cir. 1993); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Lie v. St. Joseph Hosp.*, 964 F.2d 567 (6th Cir. 1992); *Bhan*, 929 F.2d 1404; *Oksanen*, 945 F.2d 696; *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988).

> *Stationery & Printing Co.*, 472 U.S. 284, 105 S. Ct. 2613, 86 L.Ed.2d 202 (1985), with *Associated Press v. United States*, 326 U.S. 1, 65 S. Ct. 1416, 89 L.Ed. 2013 (1945), although such a restriction might well fall after a more complete analysis under the rule of reason.

U.S. Healthcare, 986 F.2d at 594.[33] *See Futurevision Cable Sys. v. Multivision Cable TV*, 789 F. Supp. 760, 774-75 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993).

Indeed, this Court has made it abundantly clear that "horizontal" boycotts or refusals to deal must be treated under the rule of reason, unless the participants in the alleged conspiracy have a dominant market position and are able to cut off access to a supply, facility, or market necessary to enable the boycotted party to compete. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985).[34]

In a desperate attempt to rewrite the antitrust history of horizontal agreements, Capital either mistakenly or intentionally misrepresents that six circuit courts of appeals "have resisted attempts by antitrust defendants to assert purported lack of market power as an excuse for horizontal restraints of trade." Petition at 17. In fact, none of the cases cited by Capital support this proposition

---

[33] There can be no doubt that MVMA's relationship with MVP is a legitimate joint venture. MVP pays MVMA on the basis of a negotiated, fixed-amount per enrollee per month (capitation payment). Brief of Plaintiff-Appellant at 5. Thus, although individual MVMA physicians are paid on the basis of fee-for-service, those fee-for-service payments, in the aggregate, are limited by the capitation amount paid by MVP to MVMA. Moreover, twenty percent of each physician's compensation is withheld in order to assure that the capitation amount is sufficient. J.A. at A-63.

[34] The *Northwest Wholesale* case involved a horizontal agreement among competitors to exclude another competitor from a group purchasing cooperative. In that case, the Supreme Court reversed the court of appeals in finding that *per se* analysis was not applicable.

and, moreover, several of the cases clearly reach the opposite conclusion.[35]

III. THE CONDUCT CHALLENGED BY CAPITAL IS NOT A NAKED RESTRAINT

There can be no doubt that HMOs are procompetitive precisely because of the exclusion of some providers.

---

[35] Capital cites *Oltz* for the proposition that market effects are not necessary in horizontal cases. Nevertheless, the next sentence of text following Capital's quotation from *Oltz*, 861 F.2d at 1448, reads: "[b]ecause market definition and market power are merely tools designed to uncover competitive harm, proof of 'actual detrimental effects, such as a reduction of output, can obviate the need . . . [for] elaborate market analysis." *Id.* (citations omitted). The court in *Oltz* concluded that the plaintiff demonstrated actual anticompetitive effects. Although the Sixth Circuit criticized the findings of anticompetitive effects by the FTC, it gave deference to those findings in *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992). However, the court clearly understood it must "examine the evidence of the power of petitioners in the relevant market." 955 F.2d at 470 (citations omitted). The 1988 Third Circuit opinion in *Miller v. Indiana Hospital*, 814 F. Supp. 1254 (W.D. Pa.), *aff'd*, 975 F.2d 1550 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1366 (1993), cited by Capital is a prior opinion which does not address the substance of Capital's antitrust claims. However, on remand, the district court clearly did not support Capital's proposition. 814 F. Supp. at 1260.

> In order for plaintiff to meet his burden, he must prove what market he contends was restrained and that the defendants played enough of a significant role in the relevant market to impair competition significantly. . . . 'Market power means the ability to injure consumers by curtailing output and raising price.' . . . Without such market power, any restraint on trade created by the defendants' actions is unlikely to implicate Section 1.

Id. In the text of the Eleventh Circuit's opinion in *National Bancard Corp. v. VISA, U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986), following the quote by Capital, the court concludes, "[t]his case does not fall in a sufficiently similar fact pattern to warrant strict application of the *NCAA* language. Therefore, in analyzing the competitive advantages and disadvantages of the [challenged restraint], market power was a proper and useful tool for the district court." 779 F.2d at 604.

Northwest Medical, 794 P.2d 428. Indeed, Capital concedes as much. Moreover, Capital also concedes that the Health Plan constitutes a "joint venture." Petition at 2. Given these concessions, Capital cannot plausibly argue that the Health Plan's conduct amounts to a "naked restraint."

Even though the rule of reason clearly applies to this case, Capital would have this Court categorize the alleged anticompetitive conduct as a "naked restraint," and analyze it under Capital's version of the *per se* rule.[36] Courts have been consistent in categorizing the type of conduct that is, and that is not, a "naked restraint." Moreover, this Court has been consistent that the analysis for "naked restraints" does not apply to joint ventures because of their procompetitive effects. *NCAA*, 468 U.S. at 112; *Maricopa County*, 457 U.S. at 365 (Powell, J., dissenting); *Broadcast Music, Inc. v. Columbia Broadcasting*

---

[36] Capital also attempts to present as authority, cases which are entirely inapplicable to this case. Capital cites *United States v. Topco Associates*, 405 U.S. 596 (1972), for the general proposition that this Court "emphasized that horizontal restraints are inherently anticompetitive." Petition at 12. Capital, however, neglects to indicate that the Court in *Topco* referred specifically to horizontal territorial market allocation agreements which have always been deemed *per se* antitrust violations. *Id.* at 608-10. This is not a *per se* case.

Further, Capital cites *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), for the general proposition that "[c]oercive activity . . . may be condemned without proof of its actual market effects." Petition at 15-16. However, the Court further stated that "[w]e do not know what kind of coercion defendants allegedly employed, we assume for purposes of decision that it had a predatory 'nature and character'," 459 U.S. at 528 n.18, and that had the plaintiff been required "to describe the nature of the alleged coercion . . . it might well have been evident that no violation of the law had been alleged," *Id.* at 528 n.17. The conduct in this case is not predatory coercion, and, thus, the case is not a precedent for the analysis of the Health Plan's conduct.

System, Inc., 441 U.S. 1, 22-23 (1979). A "naked restraint" exists only where there is a non-ancillary and explicit arrangement to restrict price or output. *Id.* It is abundantly clear that the present case involves neither type of restriction. There is no "naked restraint" involved here.

Capital's feeble attempt to bootstrap the application of the *per se* presumptions of anticompetitive effects by using words like "horizontal" and "naked restraint" are unavailing. Such incantations cannot change the undisputed facts in this case and the long-standing framework of analysis under Section 1 of the Sherman Act.[37]

CONCLUSION

Capital fails to assert any valid reasons for this Court to grant a Writ of Certiorari. Indeed, Capital's entire argument is constructed around a disingenuous effort to mischaracterize the Health Plan's conduct as a "naked restraint," and to fashion a new antitrust analysis not dependent on the existence of market power or actual anticompetitive effects.

---

[37] Capital attempts to disingenuously blurr the clear difference between a "naked restraint" and the conduct at issue in this case. For example, Capital asserts that the court of appeals' citation of *Bhan*, 929 F.2d 1404, is inapposite and reveals a "misunderstanding" on the part of that court "of the role of empirical evidence in rule of reason analysis" because *Bhan* did not involve a "naked restraint." Petition at 25. However, as in *Bhan*, no "naked restraint" is involved in the current case either. Hence, reliance on *Bhan* is perfectly reasonable in the context of the present case. Similarly, Capital relies upon *Hahn* which concludes that defendant had the "burden . . . of putting forward a plausible, justifiable explanation for its conduct," *Hahn*, 868 F.2d at 1031. *Hahn* involved a "naked restraint." *Id.* at 1026. Indeed, the court clearly stated that "[o]rdinarily, [market power] is an essential ingredient in a rule-of-reason case" except "where the conduct should be viewed as a per se violation [i.e., as a "naked" restraint on price or output.]" *Id.* (citing *NCAA*, 468 U.S. at 109).

This Court and lower federal courts agree that an exclusion from a joint venture, by physicians participating in such joint venture, is analyzed in accordance with the rule of reason. Under the rule of reason, Capital is required initially to demonstrate that the Health Plan's conduct adversely affects competition or that it possesses market power. Capital has failed to meet its initial burden.

Capital, thus, attempts to manufacture a conflict among the Circuits and this Court as to its burden under the rule of reason. No such conflict exists. Indeed, the courts are in harmony with regard to the treatment of restraints like the one which is the subject of Capital's claim. This case poses no issues which require Supreme Court review.

For the foregoing reasons, Respondents respectfully request that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Of Counsel:

CLIFFORD E. BARNES
J. EDWARD NEUGEBAUER
ALEXANDER B. BOUTON

WILLIAM G. KOPIT
Counsel of Record
EPSTEIN BECKER & GREEN, P.C.
1227 25th Street, N.W.
Washington, D.C. 20037
(202) 861-0900
Attorneys for Respondents

FILED
OCT 21 1993
OFFICE OF THE CLERK

No. 93-391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CAPITAL IMAGING ASSOCIATES, P.C.,

Petitioner,

vs.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., MOHAWK VALLEY PHYSICIANS HEALTH PLAN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

PHILLIP G. STECK
Counsel of Record
MARK E. WATKINS
COOPER, ERVING, SAVAGE, NOLAN & HELLER
Counsel for the Petitioners
39 North Pearl Street
Albany, New York 12207
(518) 449-3100

BEST AVAILABLE COPY

TABLE OF CONTENTS

PRELIMINARY STATEMENT 2

ARGUMENT 3

I. A NEW DECISION UNDERSCORES THE NEED FOR THIS COURT TO GRANT CERTIORARI. 3

A. Three Reasons to Grant Certiorari. 4

B. The *Brown* decision illustrates each of these three reasons..... 8

CONCLUSION 20

TABLE OF AUTHORITIES

Opinions Below

Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 791 F. Supp. 956 (N.D.N.Y. 1992) 2

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 545 (2nd Cir. 1993) 5

Federal Cases

Austin v. McNamara, 797 F.2d 728 (9th Cir. 1992) 7

In re Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S.Ct. 461 (1992) 18

Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) ... 5, 10, 11, 17

Flegel v. Christian Hospital Northeast-Northwest, 1993-2 Trade Cas. (CCH) ¶ 70,355 (8th Cir. 1993) 7

Hahn v. Oregon Physicians Serv., 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) 10

Hassan v. Independent Practice Assocs., 698 F. Supp. 679 (E.D. Mich. 1988) 7

Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984) 9

National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) .. 8, 10

National Soc'y of Professional Engineers, 435 U.S. 679 (1978) 10, 11, 16

United States v. Brown Univ., 1993-2 Trade Cas. (CCH) ¶ 70,358 (3rd Cir. 1993) ..... *passim*

Miscellaneous

7 P. Areeda, *Antitrust Law* (1986 with 1993 Supp.) 8, 12, 13, 18, 19

P. Areeda, *The Rule of Reason - A Catechism on Competition*, 55 Antitrust L.J. 571, 579 (1986) 15, 17, 18

No. 93-391

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

Capital Imaging Associates, P.C.,
Petitioners,
v.
Mohawk Valley Medical Associates, Inc., Mohawk Valley Physicians Health Plan, Inc.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner Capital Imaging Associates, P.C. ["Capital"] submits this Reply in response to the Brief of respondents, Mohawk Valley Medical Associates, Inc. ["MVMA"] and Mohawk Valley Physicians Health Plan, Inc. ["MVP"].

PRELIMINARY STATEMENT

MVMA includes 64% of all physicians in Schenectady County (including 75-80% of primary care physicians in that county) [A594], 82% of all physicians in Saratoga County, 69% in Montgomery County, 46% in Fulton County, and 35% in Rensselaer County. [A460][1] These figures are specifically referred to in the opinion of the District Court. *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 791 F. Supp. 956, 966 (N.D.N.Y. 1992) [App. to Pet., pp. A-56-57]. Respondents' allegation in their brief [pp. 19-20] that Capital first presented these statistics on petition to this Court is a complete falsehood.

Capital's presentation of its anti-

[1] These references are to the Appendix filed in the proceedings before the United States Court of Appeals for the Second Circuit.

trust claim has been entirely consistent at all stages of this litigation. Capital argued to the District Court as follows:

> Capital has demonstrated that defendants [MVMA and MVP] purposefully excluded Capital in order to protect MVMA's radiologist members from competition. An arrangement which excludes competitors cannot be sustained under the Rule of Reason unless a pro-competitive justification for the practice is supplied. . . . [T]he present case involves the horizontal exclusion of Capital by an organization of its competitors, with the result that referring physicians and their patients are deprived of choice among competing radiologists based on differences in quality, service and location.

[SA 80, 85, 86][2]

ARGUMENT

I. A NEW DECISION UNDERSCORES THE NEED FOR THIS COURT TO GRANT CERTIORARI.

The split in the Circuit Courts iden-

[2] These references are to the Supplemental Appendix filed by respondents in the proceedings before the United States Court of Appeals for the Second Circuit.

tified in the petition is further elucidated by *United States v. Brown Univ.*, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3rd Cir. 1993), a recent decision referred to obliquely by respondents. *Brown* was decided on September 17, 1993, while the petition herein was going to press. Hence, *Brown* will be discussed at length in this reply brief *infra*.

A. Three Reasons to Grant Certiorari

Respondents' brief is filled with rhetoric, adjectives, and hyperbole, but, in substance, only enhances Capital's position that it is imperative for this Court to grant certiorari. They point out three reasons why the very meaning of the antitrust Rule of Reason is at stake.

First, the ramifications of this case extend far beyond the field of health care. In particular, this case forms part

of a larger controversy among the Circuits concerning the meaning of a fundamental antitrust decision, *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). The Third Circuit in *Brown* takes petitioner's side in this controversy.

Second, this Court should grant certiorari to preserve the important distinction between horizontal and vertical restraints. The Court of Appeals squarely held that the conspiracy between MVP and MVMA was horizontal. *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 545 (2nd Cir. 1993). "Our view does not interfere with either an HMO's ability to enter into vertical agreements with doctors associations or with physicians' abilities to regulate membership in practice associations for medically supportable reasons."

Id. Capital objects to a particular abuse of the process of applying for admission to an association of approximately 70% of the physicians in a five county area. The association denied Capital membership without medical justification, with the intent of insulating its members from competition in the five county area, and had sufficiently "captured" an insurer, MVP, to induce it to join the conspiracy.

Nevertheless, respondents realize that the linchpin of the Second Circuit's decision, *i.e.* its demand for empirical proof of market power or anticompetitive effect, does not make sense in the context of a horizontal restraint. Such a requirement was specifically rejected by the Third Circuit in *Brown*. Consequently, respondents misrepresent Capital's case as challenging a health insurer's right to

enter into an exclusive contract with a preferred physicians' organization. They deny restraining competition in the health insurance market and provide this Court with string citations of over 20 cases involving exclusive contracts and tying arrangements, classic vertical restraints. However, these arguments attempt to erect a straw man. They have nothing to do with Capital's challenge to its horizontal exclusion from membership in an association of competing physicians.[3]

Third, respondents argue that the procompetitive virtues of HMOs should

[3] Respondents cite two cases in which physicians were disciplined or not hired for medical reasons. *Flegel v. Christian Hospital Northeast-Northwest*, 1993-2 Trade Cas. (CCH) ¶ 70,355 (8th Cir. 1993); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679 (E.D. Mich. 1988). *See also, Austin v. McNamara*, 797 F.2d 728 (9th Cir. 1992) (immunity for peer review process under Health Care Quality Improvement Act). In contrast, no medical justification was ever offered for the exclusion of Capital, nor was Capital the subject of anything remotely resembling a valid medical peer review process.

absolve them of responsibility for their concerted effort to restrain competition among physicians. However, as in *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984), the undoubted legitimacy of the joint venture does not shield a particular restraint from antitrust scrutiny. 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 432 (1986). When a joint venture imposes a naked restraint on competition, the Third Circuit held in *Brown* that the factfinder must decide at trial whether there are any procompetitive justifications which can overcome the nakedness of the restraint. This is precisely the result sought by petitioners herein.

B. The *Brown* decision illustrates each of these three reasons.

In *United States v. Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3rd Cir.

1993), the Department of Justice sought to invalidate a horizontal agreement in which eight Ivy League Colleges and the Massachusetts Institute of Technology (MIT) distributed financial aid solely on the basis of need and determined collectively the exact amount of financial assistance given to each student admitted to member schools. The agreement allegedly deprived students of the benefits anticipated if schools freely competed to attract needy or academically exceptional students. After a ten-day bench trial, the District Court found for the plaintiff.

The Court of Appeals' recited the general Rule of Reason principles quoted in respondents' brief. [pp. 9-10, citing, *inter alia*, *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984)]. However, the Third Circuit did not apply this analysis

to the horizontal restraint.

> In addition to the traditional rule of reason and the *per se* rule, courts sometimes apply what amounts to an abbreviated or 'quick look' rule of reason analysis. It applies in cases where *per se* condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint. See *NCAA*, 468 U.S. at 109 (quoting [*National Soc'y of*] *Professional Engineers*, 435 U.S. [679 at] 692 [1978]; *Indiana Dentists*, 476 U.S. at 459). [Parallel citations omitted]. Because competitive harm is presumed, the defendant must promulgate 'some competitive justification' for the restraint, 'even in the absence of detailed market analysis' indicating actual profit maximization or increased costs to the consumer resulting from the restraint. [*Id.*].

Id. at 70,889.[4]

[4] The Court in *Brown* did not view *NCAA*, *Dentists*, or *Engineers* as decisions based on an implicit finding of market power. The Third Circuit thus disagrees with the Jorde and Teece article cited by respondents in their brief [p. 21] which advocates a change in existing law. *Brown* also rejected respondents' contention that an antitrust defendant must justify its conduct only when the *per se* rule is invoked. *Accord*,

The Court regarded this method of analysis as an integral part of the Rule of Reason (and not some bastardization of the *per se* rule, as respondents suggest). Shifting the burden to the defendant to justify its conduct was entirely appropriate because the practice "'impeded the ordinary give and take of the market place,'" and hence was "anticompetitive 'on its face.'" *Id.* at 70,892-93. [citing *Engineers*, 435 U.S. at 692-93 (1978)].

Indeed, shifting the burden to respondents to justify their conduct is even more appropriate in the present case than in *Brown*. In *Brown*, the intent of the colleges in adopting the plan was uncer-

Hahn v. Oregon Physicians Serv., 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) (only price fixing claim given *per se* treatment; nevertheless, physicians' association required to justify horizontal exclusion under Rule of Reason without detailed market analysis, citing *Dentists*).

tain. On the other hand, the Second Circuit specifically identified the evidence that these respondents intended to restrain competition.

> The defendants' intention may serve a special role in helping to characterize the conduct of generally lawful associations. . . . Although not determinative, intention may illuminate an otherwise uncertain effect, benefit or virtue. . . . If [respondents] fail to suggest any [benefits from their conduct], the court is entitled to assume there are none. Redeeming virtue is also negated by a stated exclusive purpose to eliminate competition inter se.

Areeda, *supra*, ¶ 1506, p. 392, 1993 Supp., p. 1115. *Accord*, *Brown*, 1993-2 Trade Cas. at 70,891 ("courts often look at a party's intent to help judge the likely effects of challenged conduct"). The doctors' own intent provides a far better guide to respondents' influence in the market than their misleading statistics. "They

therefore believe that they have the market power to make it selfishly worthwhile to restrain competition among themselves." Areeda, *id*.

A restraint is "naked" when the defendant is entirely unable to identify "those benefits to society which will be lost if we prohibit the challenged conduct." Areeda, *supra* at ¶ 1504, pp. 378-79. As the Second Circuit correctly pointed out, the HMO will function just as effectively, if not more so, if respondents are prohibited from excluding Capital for illegitimate, non-medical reasons.

In *Brown*, the Third Circuit unequivocally rejected the identical arguments advanced by respondents herein.

> **MIT's principal counterargument is that an abbreviated rule of reason analysis is appropriate only . . . when evidence establishes that 'the challenged practice, unlike Overlap, mani-**

> **festly has an adverse effect on price, output, or quality.'** . . . As the Division aptly points out, however, if an abbreviated rule of reason analysis always required a clear evidentiary showing of detrimental effect on price, output, or quality, it would no longer be abbreviated. . . . **This is because proof of actual adverse effects generally will require elaborate, threshold industry analysis that an abbreviated inquiry is designed to obviate.** . . . MIT's position is also contradicted by Supreme Court precedent.

1993-2 Trade Cas. at 70,893. [Citations omitted.] [Emphasis added.] The Third Circuit agreed with petitioners that a showing of harm to the competitive process is sufficient to shift the burden to defendants to justify their conduct. "[A]ctual dollar amounts do not reflect the harm to competition which Congress intended to eliminate in enacting the Sherman Act." *Id.*

The Court in *Brown* saw no need to

define the proper geographic market (if one were possible to define). Elaborate market analysis was not required in the case of a naked restraint. Nor did the Third Circuit regard as significant students' ability to enroll at a wide variety of alternative colleges of equal prestige, such as Stanford, not to mention smaller Eastern schools, such as Amherst and Williams. The availability of alternatives does not obviate the need to justify anti-competitive conduct. "If the type of restraint appeared significant and the redeeming virtues did not appear powerful, it would take little proof to persuade the tribunal that the restraint is unreasonable, notwithstanding competition from other financial institutions." P. Areeda, *The Rule of Reason - A Catechism on Competition*, 55 Antitrust L.J. 571, 579 (1986).

MVP has no right to artificially force consumers to go outside the health plan to obtain access to additional radiologists. "The [Supreme Court explained that 'the Rule of Reason does not support a defense based on the assumption that competition itself was unreasonable.'" *Brown*, 1993-2 Trade Cas. at 70,895 [quoting *Engineers*, 435 U.S. at 696]. Moreover, the claim that the health plan had a sufficient number of radiologists was not asserted when the decision to exclude Capital was made. Rather, it was a *post hoc* rationalization propounded by respondents' attorneys. [A169-71,346-78]

Ultimately, the Court of Appeals in *Brown* reversed and ordered a new trial because the District Court failed to give adequate treatment to the procompetitive justifications proffered by MIT. MIT

argued that the challenged restraint actually enhanced consumer choice. *Id.* at 70,894. Although Capital readily concedes that HMOs are procompetitive generally, respondents have not even hinted at a way in which the particular restraint at issue can enhance consumer choice.

The primacy of consumer choice in *Brown* demonstrates that any direct attack on competition, whether or not it impacts upon price, is properly classified as a naked restraint. "[R]estraining competition for its own sake" and "price fixing" are both classic examples of naked restraints. Areeda, *The Rule of Reason*, *supra*, at 577. This is the proper interpretation of *Dentists*.

> [T]he [Supreme] Court emphasized that the dentists limited consumer choice, impeding the ordinary give-and-take of the market place: the dentists were not entitled to pre-empt the market

> and decide collectively that their customers do not need that which they demand.

Id. at 576.[5]

Thus, injury to the competitive process is critical to antitrust analysis. Particularly at the summary judgment stage, the Rule of Reason does not mandate inquiring whether the competitive process has been sufficiently impaired to ultimately generate empirical or quantitative evidence of harm to price or quality. "[O]utput is not always a clear concept. Even when we define it, it is usually difficult to observe. Many alleged restraints are examined before they have had time to work their results." 7 Areeda, *supra*, at ¶ 1503, p. 376.

[5] Non-price restraints have also been classified as "naked." *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S.Ct. 461 (1992).

Rule of Reason analysis begins with an effort to predict the consequences of a challenged restraint.

> This standard formulation [*Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918)] points us in two clear directions, and a third as well. *First*, what harm to competition results or may result from the collaborators' activities? *Second*, what is the object they are trying to achieve, and is it a legitimate and significant one; that is, what are the nature and magnitude of the 'redeeming virtues' of the challenged collaboration? *Third*, is the restraint reasonably necessary for the achievement of any such legitimate objectives?

Id. at ¶ 1502, p. 371.

When a practice, such as MVMA's exclusion of Capital, is intended as a direct attack on competition, intrinsically reduces consumer choice, and has no redeeming virtue, it is inappropriate to award the defendant summary judgment on the ground that the restraint has not yet

achieved its intended effects. Rather, the matter should proceed to trial. At trial, "[t]he absence of any finding of adverse effects such as higher price or lower output is relevant, albeit not dispositive, when the district court considers whether [the defendant] has met this burden [to justify its conduct]." *Brown*, 1993-2 Trade Cas. at 70,893.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

COOPER, ERVING, SAVAGE,
NOLAN & HELLER
39 North Pearl Street
Albany, New York 12207
(518) 449-3100

Phillip G. Steck, Counsel of Record
Mark E. Watkins, Of Counsel

Counsel for the Petitioners